

Why the Paradox of Blackmail is so Hard to Resolve

Peter Westen*

The paradox of blackmail is the apparent contradiction between what popular intuition as opposed to reasoned reflection regards as criminally culpable. Popular intuition indicates that it ought to be criminal—indeed, a paradigmatic instance of blackmail—for an actor, A, to extract value from a celebrity, B, by threatening unless paid to reveal an embarrassing secret about B (e.g., that B has an illegitimate child or is guilty of adultery), while offering if paid to remain silent. Yet reason suggests that there is nothing wrong with A's extracting value from B regarding a lawfully-marketable good, i.e., information, by A's conditionally threatening and offering to do things with the information that are lawful when done unconditionally (i.e., disclosing it or withholding it, whichever A prefers). I believe that many instances of criminalized blackmail are no more paradoxical than run-of-the-mill extortion, because what actors conditionally threaten and offer to do in such cases is actually unlawful—though not necessarily criminal—when done unconditionally. Yet truly paradoxical cases remain, including the aforementioned one involving celebrity B. I argue that the continued criminalization of such cases is based upon the same intuition that underlies that much-criticized doctrine of double effect: the intuition that an actor who reasonably believes that the harm he is inflicting is a lesser evil under the circumstances is, nevertheless, culpable, if his motivating purpose is to inflict the harm. The criminalization (and, hence, the paradox) will persist until lawmakers are persuaded it is a misapplication of otherwise valid roles for purpose and motive in criminal law and morals.

I began this essay in the hope of solving the paradox of blackmail by providing a normative account that squares with people's intuitions. But blackmail has humbled me, as it has humbled better commentators before me.¹ I confess I

* Frank G. Millard Professor of Law, Emeritus. University of Michigan. I am deeply grateful to Mitch Berman for his extensive comments on an earlier draft.

¹ Cf. Donald A. Dripps, *The Priority of Politics and Procedure over Perfectionism in Penal Law, or, Blackmail in Perspective*, 3 CRIM. LAW & PHIL. 247, 248 (2009) ("Only one proposition is common to all modern academic writing on blackmail, and that is the proposition that all accounts other than that proposed by the instant author have failed to persuade."). See also Russell L. Christopher, *A Political Theory of Blackmail: A Reply to Professor Dripps*, 3 CRIM. LAW & PHIL. 261 (2009) ("I agree with Professor Donald Dripps' assessment, as perhaps do all blackmail scholars, that no theory of blackmail has attained a consensus beyond that theory's progenitor.").

cannot fully account for what the law currently criminalizes as blackmail and what ordinary observers, when questioned, agree should be punished. Nevertheless, I have learned some things along the way that may be of value to others. I believe I can show why most categories of blackmail are not paradoxical at all and why the remaining category—which is indeed paradoxical—is so difficult to resolve.

I will (1) describe the legal substance, conceptual structure, and terminology of blackmail; (2) describe the paradox of blackmail and the principal ways in which commentators have sought to resolve it; (3) identify five, significant categories of blackmail; (4) show that categories 1–4 are no more paradoxical than run-of-the-mill extortion; and (5) examine the source of the tension between intuition and reason that characterizes the fifth category.

I. PRELIMINARIES: THE SUBSTANCE, STRUCTURE, AND TERMINOLOGY OF BLACKMAIL

A. *The Substance of Blackmail in Criminal Law*

Commentators write about “blackmail” as if jurisdictions have agreed on what it is and what to call it. Yet the substance of the offense, as well as the names under which it goes, are as heterogeneous as its history.

The term “blackmail” stems from two archaic terms: “mail” from the French word “maille,” referring to coins that Scottish bandits historically extorted from English landowners by promising to keep the landowners safe from marauding Scots (who implicitly included the bandits themselves); and “black” from an English statute of 1601 which prohibited such “black mayle.”² For much of its history in English law, blackmail referred to the non-paradoxical crime of demanding property or conduct on the part of another in return for protection from criminal harm, under the threat of otherwise inflicting that very harm. The law was extended in the mid-18th century to criminalize the practice of obtaining, or attempting to obtain, property of another in return for refraining from accusing the other of an infamous crime. And it was further extended in Victorian England to criminalize what we think of today as “informational blackmail” in general, that is, the practice of obtaining or attempting³ to obtain property of another in return for

² See R.H. Helmholz, *The Roman Law of Blackmail*, 30 J. LEGAL STUD. 33, 35 (2001); ANGUS McLAREN, *SEXUAL BLACKMAIL: A MODERN HISTORY* 12–13 (2002). The so-called “Waltham Black Act” of 1722, which criminalized threats to commit such extortion, further solidified usage of “blackmail.” See also Douglas H. Ginsburg & Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849, 1851 (1993).

³ Some statutes explicitly make it a crime to “obtain or attempt to obtain” property of another.” See, e.g., MISS. CODE ANN. § 97-3-82 (2010) (emphasis added). Other jurisdictions define the offense in terms of successfully “obtaining” property but then punish attempts to do so as “attempts” to commit such crimes. See, e.g., N.Y. PENAL LAW § 155.05 (2010); *People v. Leisner*, 535 N.E.2d 647 (N.Y. 1989).

keeping incriminating or embarrassing information secret, under the threat of otherwise disclosing the information.⁴

The first blackmail statutes appeared in the United States in 1817.⁵ Most U.S. jurisdictions now make such conduct a crime.⁶ The Kansas blackmail statute is a good example.

Kansas Criminal Code § 64(a) (2010)

Blackmail is gaining or attempting to gain anything of value or compelling or attempting to compel another to act against such person's will, by threatening to communicate accusations or statements, about any person that would subject such person or any other person to public ridicule, contempt or degradation.

Despite this core meaning of blackmail, state statutes differ along four significant dimensions regarding: (1) whether the offense is confined to demands for *property*, or whether it also extends to demands that a victim engage in or refrain from *conduct*;⁸ (2) whether the offense is confined to threats to disclose incriminating or embarrassing *information*,⁹ or whether it also extends to threats to

⁴ See McLAREN, *supra* note 2, at 31–38 (discussing 18th and 19th century England law); Chen Yehudai, *Information Blackmail: Survived by Technicality?*, 92 MARQ. L. REV. 779, 796–812 (2009) (same).

⁵ See Lawrence M. Friedman, *Name Robbers: Privacy, Blackmail, and Assorted Matters in Legal History*, 30 HOFSTRA L. REV. 1093, 1111 (2002).

⁶ For a survey of U.S. statutes on blackmail, see Paul H. Robinson et al., *Competing Theories of Blackmail: An Empirical Research Critique of Criminal Law Theory*, 89 TEX. L. REV. 291, 308–13 (2010).

⁷ KAN. STAT. ANN. § 21-5428a (2011). Russell Christopher asserts that criminal blackmail can encompass threats to disclose “laudatory” information, provided the target wishes to keep it secret. See Christopher, *supra* note 1 (“discussing a hypothetical ‘Anonymous Philanthropist’”). In theory, criminal blackmail *ought* to encompass threats to disclose laudatory information, if such disclosure would violate a jurisdiction’s legal norms of privacy. But to the best of my knowledge, criminal blackmail does not extend that far but, rather, is confined to threats to disclose information that, if disclosed, would subject a person to “ridicule, contempt or degradation.”

⁸ Compare MISS. CODE ANN. § 97-3-82 (2010). (“A person is guilty of extortion if he purposely obtains . . . *property of another* . . . by the public or private revelation of information not previously in the public domain for the purpose of humiliating or embarrassing the other person.”) (emphasis added), with N.M. STAT. ANN. § 30-16-9 (2010) (“Extortion consists of the communication . . . of any threat . . . with intent thereby to wrongfully obtain anything of value or to wrongfully compel the person threatened to *do or refrain from doing any act* against his will”) (emphasis added). Some jurisdictions replicate what New Mexico consolidates with a single statute by enacting separate statutes—one of which protects “property,” the other of which protects persons from being “coerced” into doing or refraining from doing what they wish, see, e.g., ALASKA STAT. § 11.41.520 (2011) (“extortion” of “property”); *id.* at § 11.41.530 (2011) (“coercion” to engage in or refrain from “conduct”).

⁹ See, e.g., D.C. CODE § 22-3252 (2011)(a):

A person commits the offense of blackmail, if, with intent to obtain property of another or to cause another to do or refrain from doing any act, that person threatens (1) To

perform other lawful but unwelcome *acts*;¹⁰ (3) whether it contains no exceptions, or whether it permits actors to commit the offense under specified circumstances;¹¹ and (4) whether the offense is denominated “blackmail”¹² or whether (as happens more frequently) it figures as a subset of more general offenses of “extortion,” criminal “threats,” “theft,” “larceny,” or “coercion.”¹³

Myself, I shall use “blackmail” to refer to conduct that the Kansas statute makes an offense, unless I specify otherwise.

B. *The Conceptual Structure of Blackmail*

Blackmail shares something in common with both criminal extortion and free commercial exchange: they all consist of efforts by an agent, A, to elicit something of value from a target, B, by structuring B’s options (or purporting or attempting to structure them) so that B is induced to surrender value to A. Like extortionists and legitimate businessmen, blackmailers do so by explicitly or implicitly confronting targets with what Feinberg insightfully calls “biconditional proposals”:¹⁴

accuse any person of a crime; (2) To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule; or (3) To impair the reputation of any person, including a deceased person.

¹⁰ Compare MONT. CODE ANN. § 45-5-305 (2011) (confining “blackmail” to threats to use information), with ARK. CODE ANN. § 5-36-101(1) (2011) (defining “threat” to include any “menace” communicated in order to: * * * (iii) Accuse any person of a crime; (iv) Expose a secret or publish a fact tending to subject any person, living or deceased, to hatred, contempt, shame, or ridicule; (v) Impair any person’s credit or business repute; * * * or (ix) Do any other act which would not in itself substantially benefit the actor or a group he or she purports to represent but which is calculated to harm another person in a substantial manner with respect to his or her health, safety, business, employment, calling, career, financial condition, reputation, or a personal relationship.).

¹¹ Compare OKLA. STAT. ANN. tit. 21, § 1488 (West 2010) (no explicit defenses), with HAW. REV. STAT. § 707-769 (2010):

It is an affirmative defense to a prosecution for extortion . . . that the defendant believed the threatened accusation, penal charge, or exposure to be true . . . and that the defendant’s sole intention was to compel or induce the victim to give property or services to the defendant due the defendant as restitution or indemnification for harm done, or as compensation for property obtained or lawful services performed, or to induce the victim to take reasonable action to prevent or to remedy the wrong which was the subject of the threatened accusation, charge, exposure, or action of a public servant in circumstances to which the threat relates.

¹² For jurisdictions that, like Kansas, refer to the offense as “blackmail,” see D.C. CODE § 22-3252(a) (2011); N.C. GEN. STAT. § 14-118 (2007); OKLA. STAT. ANN. tit. 21, § 1488 (West 2003); WYO. STAT. ANN. § 6-2-402 (2010).

¹³ For jurisdictions that subsume informational blackmail within broader offenses, see, e.g., ALASKA STAT. § 11.41.520 (2010) (“extortion”); MASS. GEN. LAWS ANN. ch. 265, § 25 (West 2010) (“threat”); WIS. STAT. § 943.30-.31 (2009) (“threat”); ARK. CODE ANN. § 5-36-103 (2006) (“theft”); N.M. STAT. ANN. § 30-16-9 (2010) (“extortion”).

¹⁴ 3 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF* 216–19 (1986) [hereinafter *HARM TO SELF*].

If you compensate me, I will *not* do X.
 If you do not compensate me, I *will* do X.

Each of these two alternative courses of action is explicitly conditional rather than unconditional. The two conditional commitments are also linked, which is why Feinberg calls them "biconditionals." That is, A does not merely commit himself to refrain from doing X if he is compensated, or merely commit himself to do X if he is not compensated. Rather, his commitment to do X if he is *not* compensated is combined with his "commitment"¹⁵ not to do X in the event he *is* compensated, and vice versa.

Extortion, commercial exchange, and blackmail are all biconditionals of the foregoing kind. The difference among them lies in what A conditionally proposes to do or not do, depending upon whether he is compensated. That is, the difference lies in what the variable term, "X," consists of. In the case of extortion, X consists of a criminal harm to B or to someone about whom B cares, e.g., an assault on B. In the case of commercial exchange, X consists of withholding a commercial good, currency, or service. In the case of informational blackmail, X consists of disclosing incriminating or embarrassing information, as follows:

-If you compensate me, I will not disclose information that is incriminating or embarrassing to you.
 -If you do not compensate me, I will disclose information that is incriminating or embarrassing to you.

C. *The Terminology of Blackmail.*

The task of justifying the offense of blackmail is made more difficult by ambiguous terms in which it is framed, including its references to "offers," "threats," and to "blackmail" itself.

1. "Offers" and "Threats"

I have thus far referred to the two proposals that combine to make a biconditional without distinguishing between them. Yet it is useful to be able to distinguish the proposal that is designed to *entice* B to do what A wishes (i.e., "If you compensate me, I will not disclose the embarrassing information") from the proposal that is designed to *intimidate* B into doing what A wishes (i.e., "If you do not compensate me, I will disclose the incriminating or embarrassing information"). I am reluctant to use the terms "offer" and "threat" because, as we shall see, they are potentially ambiguous. Nevertheless, I shall follow Joel

¹⁵ For the argument that threats consist of "commitments," see Grant Lamond, *Coercion, Threats, and the Puzzle of Blackmail*, in HARM & CULPABILITY 215, 229–30 (A.P. Simester & A.T.H. Smith eds., 1996).

Feinberg in referring to the enticing proposal as an “offer” to keep incriminating or embarrassing information secret and the intimidating proposal as a “threat” to disclose the information.¹⁶

That said, I wish to emphasize how I am *not* using “offer” and “threat.” I am not using them as commentators typically use them. (Indeed, I am not using them in the way that Feinberg himself uses them in discussing “coercion” in non-blackmail contexts.)¹⁷ Commentators typically use “offer” to refer to biconditional proposals that are, or tend to be, normatively permissible in their entirety, e.g., biconditionals in the context of commercial exchange. And they typically use “threat” to refer to biconditional proposals that are, or tend to be, normatively wrongful in their entirety, e.g., biconditionals in the context of extortion. In contrast, I am using “offer” and “threat” to draw a distinction *within* biconditionals between the portion that constitutes the enticing proposal and the portion that constitutes the intimidating proposal, without conveying anything about whether the biconditionals as a whole are permissible or wrongful.

How is it that “offer” and “threat” can be used in such distinct ways, sometimes to refer to biconditionals as a whole and, at other times, to refer to their constituent parts? The reason is that the concepts of offer and threat both contain a variable element that, when specified, dramatically alters their meanings. A “threat” is a conditional proposal by A to make things worse for B, the condition being some action or inaction on the part of B or a person under B’s control. (If the condition is not within B’s control, A’s proposal ceases to be a threat and becomes a warning.)¹⁸ In contrast, an “offer” is a conditional proposal by A to make things better for B. An offer can be conditioned upon something within B’s control (e.g., “I will marry you, if you have sex with me”) or outside B’s control (e.g., “I will marry you, if Michigan beats Ohio State”).

The variable that gives “threats” and “offers” their range—and the variable that, when unspecified, renders them ambiguous—is the baseline by which “worse off” and “better off” are measured. A biconditional that is a threat by reference to one baseline may be an offer by reference to another. Consider a sailor who happens to come across a drowning swimmer and proposes to throw him a life

¹⁶ See, e.g., 4 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* 239 (1988) [hereinafter *HARMLESS WRONGDOING*].

¹⁷ When Feinberg discusses coercion outside the context of blackmail, he defines “threats” and “offers” by reference to baselines by which biconditional proposals of the form, if -Y then X; and if Y then -X, are *either* threats *or* offers—not, as in his discussions of blackmail, *both* threats *and* offers. See *HARM TO SELF*, *supra* note 14, at 227. For a perceptive analysis of biconditional proposals that carefully decouples the two usages, see Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 *LEGAL THEORY* 45, 55–59 (2002) [hereinafter *Normative Functions*].

¹⁸ But cf. Lamond, *supra* note 15, at 227–28 (arguing that a conditional proposal by A to make things worse for B is not a “threat” unless A’s *purpose* in taking the action, were he to take it, is to leave B worse off, and that an *unconditional* commitment by A to leave B worse off can also be a “threat,” rather than merely a warning, if A’s purpose is to leave B worse off).

preserver if, and only if, the swimmer promises to pay him \$10,000, in the future.¹⁹ The biconditional proposal is an offer—and not a threat—as measured by what the swimmer could empirically have expected to happen to him if the sailor had never come along, because the sailor conditionally proposes to save the swimmer's life and, hence, leave the swimmer altogether better off than he would otherwise be. However, the proposal is a threat—and not an offer—as measured by how the drowning swimmer ought to be treated under the circumstances, because the sailor conditionally proposes to leave the swimmer worse off than he would be if the sailor did what he ought to do, namely, to unconditionally save the swimmer.

Baselines come in all shapes and forms, and commentators differ about which baselines are the most useful.²⁰ However, commentators tend to choose baselines (like the two mentioned above) that are independent of the relationship of one constituent proposal to the other. They do so because their aim is to explore the permissibility or wrongfulness of biconditionals as a whole, and because independent baselines are metrics by which biconditional proposals are either permissible (i.e., “offers”) or wrongful (i.e., “threats”). Our purpose, however, is different. Ours is to distinguish one constituent proposal within a biconditional from the other, without implying anything about permissibility or wrongfulness. We can do so in terms of “offers” and “threats,” provided we choose the appropriate baseline. The appropriate baseline is internal to biconditionals rather than independent of them: it consists of the action that each constituent proposal respectively proposes *as used* to assess the *other* constituent proposal, and vice versa. Thus, consider the italicized portions of the following constituent proposals (which I shall number “1” and “2”) that together constitute informational blackmail:

1. If you compensate me, I will *not disclose incriminating or embarrassing information*.
2. If you do not compensate me, I *will disclose incriminating or embarrassing information*.

Now start with the baseline consisting of the proposed action in Proposal 1, i.e., the baseline consisting of not disclosing incriminating or embarrassing information. Measured by the latter baseline, Proposal 2 is a threat because it proposes to leave B worse off from his point of view than when such information is not disclosed. Now take the baseline consisting of the proposed action in Proposal 2, i.e., the baseline consisting of disclosing incriminating or embarrassing information. Measured by that baseline, Proposal 1 is an offer, because it proposes

¹⁹ This hypothetical comes from Robert Nozick's seminal essay on *Coercion*, as discussed in HARM TO SELF, *supra* note 14, at 220. For Nozick's complete essay, see Robert Nozick, *Coercion*, in PHILOSOPHY, SCIENCE, AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL 440–72 (Sidney Morgenbesser, Patrick Suppes, & Morton White eds., 1969).

²⁰ For a rich discussion of possible baselines for distinguishing biconditionals that are threats from those that are offers, see HARM TO SELF, *supra* note 14, at 213–38.

to leave B better off from his point of view than when such information is disclosed.

2. "Blackmail"

The challenge of blackmail is to determine how much, if any, of what Kansas currently prohibits ought to be criminalized. Some commentators believe that all of it can be morally justified.²¹ Others think that only a portion of it can be justified,²² while still others believe none of it can be justified.²³ Since we are seeking to determine how many, if any, biconditional proposals regarding incriminating or embarrassing information ought to be criminalized, we ought to employ a term for them that is neutral. Unfortunately, the term "blackmail" is tendentious because it connotes criminality in legal as well as popular culture.²⁴ Accordingly, unless context permits unambiguous references to "blackmail," I shall eschew "blackmail" and refer instead to "biconditional proposals regarding incriminating or embarrassing information."

II. THE PARADOX OF BLACKMAIL AND A TAXONOMY OF PROPOSED SOLUTIONS

A. *The Paradox of Blackmail*

Tony Soprano and his fellow mobsters contemplate three sorts of biconditional proposals in their HBO run: (1) extortion in which they offer protection from criminal assault in return for compensation, under the implicit threat of otherwise inflicting such assaults themselves; (2) commercial exchange in which they offer legitimate market goods in return for compensation, under the threat of otherwise withholding the goods; and (3) blackmail in which they offer to

²¹ See, e.g., Michael Gorr, *Liberalism and the Paradox of Blackmail*, 21 PHIL. & PUB. AFF. 43 (1992).

²² See, e.g., Scott Altman, *A Patchwork Theory of Blackmail*, 141 U. PA. L. REV. 1639, 1640 (1993); HARMLESS WRONGDOING, *supra* note 16, at 240–58; Mark P. Gergen, *A Priest Responds to the Bean Counters: Leo Katz on Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law*, 22 LAW & SOC. INQUIRY 879, 891–92 (1997); Wendy J. Gordon, *Truth and Consequences: The Force of Blackmail's Central Case*, 141 U. PA. L. REV. 1741, 1795 (1993); Gorr, *supra* note 21, at 48–49; Joseph Isenbergh, *Blackmail from A to C*, 141 U. PA. L. REV. 1905, 1908, 1930 (1993); Ronald Joseph Scalise, Jr., *Blackmail, Legality, and Liberalism*, 74 TUL. L. REV. 1483, 1486–90 (2000).

²³ See, e.g., Russell Christopher, *Meta-Blackmail*, 94 GEO. L.J. 739 (2006) (arguing that blackmail ought to be decriminalized). See also Walter Block, *The Case for De-Criminalizing Blackmail: A Reply to Lindgren and Campbell*, 24 WEST. ST. L. REV. 225, 227 (1997) (same).

²⁴ See Walter Block & Gary M. Anderson, *Blackmail, Extortion, and Exchange*, 44 N.Y.L. SCH. L. REV. 541, 560 (2001) ("Blackmail sounds menacing and nefarious, an activity at its heart a criminal enterprise. . . . Blackmail has sinister connotations in everyday discourse, suggesting shady dealing and ill-gotten gain."); Gorr, *supra* note 21, at 43 ("Blackmail is usually regarded as a particularly sleazy business.")

keep embarrassing or incriminating information secret in return for compensation, under the threat of otherwise disclosing the information.²⁵

There is nothing paradoxical about Proposals 1 and 2. Extortion like Tony Soprano's is a crime because it consists of obtaining or attempting to obtain something of value from persons by threatening otherwise to subject them to criminal violations, e.g., to assault them.²⁶ Commercial exchange is not a crime because it merely consists of obtaining lawful value from persons (e.g., cash) by providing lawful value in return (e.g., lawfully-marketable goods) under the threat of otherwise doing something that is also lawful (i.e., withholding the goods).

In contrast, blackmail does present a "paradox,"²⁷ or what some prefer to call a "puzzle."²⁸ Unfortunately, commentators often misstate what the paradox consists of. Thus, commentators variously say that the paradox consists of it being a criminal offense

²⁵ *The Sopranos: Johnny Cakes* (HBO television broadcast Apr. 30, 2006) (Pasquale "Patsy" Parisi and Burt Gervasi attempt to extort money from the manager of the neighborhood's new Starbucks-like coffee shop by offering to sell the shop "protection" against implicit threats of vandalism in the event the payoffs are not made); *The Sopranos: 46 Long* (HBO television broadcast Jan. 17, 1999) (employees of Tony Soprano's Bada Bing bar offer to provide lawful alcoholic drinks in return for lawful payment); *The Sopranos: Cold Stones* (HBO television broadcast May 21, 2006) (Tony Soprano considers taking \$200,000 from Vito Spatafore in return for concealing the fact of Vito's homosexuality).

²⁶ See Ken Levy, *The Solution to the Real Blackmail Paradox: The Common Link Between Blackmail and Other Criminal Threats*, 39 CONN. L. REV. 1051, 1070–71 (2007) [hereinafter *The Common Link*]:

It is easy enough to see why . . . extortion itself . . . is illegal. For the target's freedoms from violence and invasion of privacy are legally protected. She has the legal right not to have these freedoms infringed by others. And this point explains why mere *threats* to commit extortion are illegal. If the extortionist comes along and demands money in exchange for continued enjoyment of any of these freedoms, she is committing *attempted theft*. She is attempting to coerce the target into paying for something to which the target is already legally entitled and therefore something for which the target does not have to pay.

²⁷ The term "paradox" has multiple meanings, including (1) its meaning in logic as a set of contradictory assertions of a certain kind; and (2) its meaning in ordinary language as a surprising conjunction. Wendy Gordon denies that blackmail constitutes a paradox by reference to meaning (1) and, for that reason, refrains from calling it a "paradox." Yet she concedes that blackmail is, indeed, a paradox by reference to meaning (2). Gordon, *supra* note 22, at 1742–43 n.12.

Blackmail also involves what DeLong calls a "second paradox"—albeit one that I shall not address—namely, the tension that exists between its being a crime to *demand* something of value in return for keeping incriminating or embarrassing information secret and its being no crime at all to *accept* something of value in return for keeping such information secret. Sidney DeLong, *Blackmailers, Bribe Takers, and the Second Paradox*, 141 U. PA. L. REV. 1663, 1663–65 (1993). See also Kathryn Christopher, *Toward a Resolution of Blackmail's Second Paradox*, 37 ARIZ. ST. L.J. 1127 (2005); James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695 (1993); Scalise, *supra* note 22, at 1484 n.9, and 1486.

²⁸ See, e.g., Russell Christopher, *supra* note 23, at 741; see Gordon, *supra* note 22, at 1742–46 (calling blackmail a "surprising conjunction").

- to conditionally *threaten* to do what one has a *legal right* to do;²⁹
- to *demand money* for *refraining* from doing what one has a legal right to do;³⁰
- to demand money from someone *from whom it is legally allowed to request money* for refraining from doing what one has a legal right to do;³¹
- to demand money for refraining from doing what one has a right to do *and what one has a legal right to commit oneself* to doing;³²
- to demand money for refraining from doing what one has a right to *do or not do*.³³

Still others say that the paradox consists of taking two things that one has a legal right to do when considered separately—i.e., to request money from another and to disclose incriminating or embarrassing information about him—and making it a crime for a person to “combine” them by threatening to disclose incriminating or embarrassing information unless one is paid.³⁴

As Michael Clark points out,³⁵ however, there is nothing paradoxical about the aforementioned relationships. Consider a person, A, who fears that, if he testifies truthfully on B’s behalf, he might incriminate himself. A has a legal right to testify truthfully on B’s behalf; to threaten to testify truthfully on B’s behalf; to refrain from testifying on B’s behalf; and to request money from B. Yet it is hardly paradoxical that it is a crime for him to threaten to testify truthfully on B’s behalf unless he is paid to remain silent, for the public has a legitimate interest in discouraging lay witnesses from corrupting the administration of justice by taking hush money to remain silent. Or consider a public official, A, who has discretionary authority to grant B a zoning variance. A has legal right to grant the variance; to threaten to grant the variance; to deny the variance; and to ask members of the public for campaign contributions. Yet it is hardly paradoxical that it constitutes criminal extortion for A to threaten B’s neighbor that A will grant the variance unless the neighbor makes a campaign contribution, for the public has a legitimate interest in discouraging public officials from basing the exercise of their public responsibilities on private gain.

²⁹ See, e.g., DeLong, *supra* note 27, at 1663; Richard A. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553, 557 (1983).

³⁰ See Ginsburg & Shechtman, *supra* note 2, at 1873.

³¹ See George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV. 1617 (1993).

³² See HARMLESS WRONGDOING, *supra* note 16, at 252.

³³ Gordon, *supra* note 22, at 1742.

³⁴ See James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670 (1984). Cf. Glanville L. Williams, *Blackmail*, 1954 CRIM. L. REV. 79, 163.

³⁵ See Michael Clark, *There Is No Paradox of Blackmail*, 54 ANALYSIS 54–61 (1994).

This does not mean, however, that Clark is right in claiming that blackmail is non-paradoxical. Blackmail is paradoxical, but the paradox is not what it is typically claimed to be. The paradox consists of the seeming contradiction between the way the law treats blackmail and what the underlying conduct actually consists of. The law treats blackmail as a crime, much like extortion. Yet, in contrast to the giving of testimony by witnesses and the exercise of discretion by public officials—neither of which may lawfully be bought and sold—blackmail appears to consist of the very things that render commercial exchange *noncriminal*: blackmail is the act of obtaining or attempting to obtain something of value from persons by offering in return to do something that is noncriminal (i.e., withhold incriminating or embarrassing information) under the threat of otherwise doing something that is also noncriminal (i.e., disclose information that can be lawfully commodified and sold for the actor's personal gain). The paradox of blackmail consists of normative tension between the following five propositions:

1. A has a legal right to *do* X, i.e., disclose incriminating or embarrassing information, as well as a legal right to unconditionally *threaten* to do X.
2. A has a legal right to *refrain* from doing X as well as a legal right to unconditionally *threaten* to refrain from doing X.
3. A has a legal right to *request money* from B.
4. A may lawfully sell X on the open market and refuse to sell on the open market, demanding money for X under the conditional threat of otherwise refraining from X.
5. Yet it is a crime for A to demand money from those whom X would incriminate or embarrass for not doing X under the conditional threat of otherwise doing X.³⁶

To say these five propositions constitute a “paradox” does not mean they are logically contradictory.³⁷ Nor does it mean that they are ultimately normatively inconsistent with one another. It means, rather, that until they are shown to be normatively consistent with one another, they appear to be normatively incongruous.

B. Taxonomy of Proposed Solutions of the Paradox

A “theory of blackmail” is an effort to do one of three things: to justify *all* of what jurisdictions like Kansas prohibit; to justify *much* of what Kansas prohibits

³⁶ Mitchell Berman argues that the *legal* paradox of blackmail has a counterpart consisting of a *moral* paradox in which it is morally acceptable to do what it is morally unacceptable to conditionally propose to do unless paid. See Mitchell N. Berman, *Blackmail*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW (John Deigh & David Dolinko eds., 2011) [hereinafter *Blackmail*]. I shall address only the legal paradox.

³⁷ *Id.*

while explaining why what remains should be decriminalized; or to explain why *none* of what Kansas punishes as blackmail ought to be criminalized.

The seriousness with which scholars theorize about blackmail vastly exceeds its practical importance. In practice, blackmail is rarely prosecuted. Thus, among the three million trial and appellate cases published by West Publishing Company in the century preceding 1993, only 124 involved blackmail.³⁸ Yet over the past two decades, it has captivated the attention from scholars—including “some of the cleverest people on the planet”³⁹—and is said to be “one of the most elusive intellectual puzzles in all of law.”⁴⁰ Next to rape and the death-penalty aspects of homicide, scholars have probably written more articles about blackmail than any other criminal offense. Blackmail attracts attention because it induces commentators to hope that solving the paradox of blackmail will reveal deeper truths about criminal responsibility generally.⁴¹

Blackmail theories fall into two broad categories: (1) consequentialist theories that seek to show that all or parts of what Kansas punishes as blackmail should indeed, be punished (or, alternatively, should not be punished), based upon the net social benefits or costs of punishing it; and (2) deontological theories that seek to show that, apart from such net benefits or costs, all or parts of what Kansas prohibits are morally wrong (or, alternatively, are not morally wrong).

I shall focus on deontological accounts because, although consequentialist accounts are informative, their emphasis on maximizing social wealth is inherently incapable of explaining why most people think that all or part of what Kansas criminalizes as blackmail ought, indeed, to be criminalized: most people think so because they believe that persons who commit such acts *deserve* to be punished because what they have done is morally wrongful.⁴²

³⁸ Richard A. Posner, *Blackmail, Privacy, and Freedom of Contract*, 141 U. PA. L. REV. 1817, 1841–47 (1993).

³⁹ Dripps, *supra* note 1, at 247.

⁴⁰ James Lindgren, *Afterword*, 141 U. PA. L. REV. 1975, 1975 (1993). For a bibliography of legal scholarship on blackmail through 2007, see *The Common Link*, *supra* note 26 at 1062–63 n.20.

⁴¹ See Lindgren, *supra* note 40, at 1975 (“The struggle to understand blackmail is a struggle for the soul of the criminal law.”).

⁴² See DeLong, *supra* note 27, at 1689:

Why does blackmail strike us as so wrongful . . . that even in the midst of a transaction cost analysis, the economist Ronald Coase would refer to it as “moral murder?” [No consequentialist theory] . . . explains the societal abhorrence of the blackmailer’s craft. Purely economic explanations of the criminal law often produce bizarre conclusions, such as that blackmail rules are intended to reduce expenditures by blackmailers. Such provocations are part of the charm of economic analysis. We all know that blackmail laws are meant to do more than prevent waste. Admittedly, it is no criticism of an economic theory that it does not seek to make such normative arguments for that is not a task it has set for itself. But a *legal* theory that does not explain the wrongness of a blackmailer’s behavior is in need of supplementation; unless one takes the view that the law is indifferent to morality.

For descriptions and criticisms of the most salient consequentialist theories, including those of Ronald Coase, Richard Epstein, Douglas Ginsburg, Joseph Isenbergh, Jeffrie Murphy, Robert

Deontological theories, in turn, fall into three categories: (1) theories, like those of Joel Feinberg⁴³ and Mitchell Berman,⁴⁴ that locate the wrongfulness of blackmail in the moral wrongfulness of the disclosures and non-disclosures that blackmailers conditionally propose, were the blackmailers to make those disclosures or non-disclosures unconditionally; (2) theories, like those of George Fletcher,⁴⁵ Michael Gorr,⁴⁶ and James Lindgren,⁴⁷ that locate the wrongfulness of blackmail in subjecting persons to linked threats and offers regarding disclosures and non-disclosures that are otherwise morally permissible; and (3) theories, like those of Walter Block⁴⁸ and Russell Christopher,⁴⁹ that find no wrongfulness in either the disclosures and non-disclosures that blackmailers conditionally propose, were the blackmailers to perform them unconditionally, or in subjecting persons to linked offers and threats regarding disclosures and non-disclosures that are otherwise morally permissible.

I shall focus on deontological Theories 1 and 2 because, as we shall see, the claim which underlies Theory 3 (i.e., that blackmail should be wholly decriminalized) is untenable: certain blackmail proposals are patently wrongful, both morally and legally, because the disclosures and non-disclosures that they respectively offer and threaten are morally and legally wrongful when done unconditionally. Nevertheless, it may help to illustrate the difference between Theories 1 and 2. To do so, let us contrast Joel Feinberg's theory of blackmail with George Fletcher's.

Feinberg's theory of blackmail is a function of his theory of criminalization. Feinberg is a disciple of the "liberalism" that John Stuart Mill advocates in *On Liberty*,⁵⁰ including the "harm principle" that lies at liberalism's core. Feinberg devotes his four-volume treatise, *The Moral Limits of the Criminal Law*,⁵¹ to the argument that the only morally legitimate reason to punish a person is to protect others from being wrongly harmed or wrongly offended. Admittedly, individuals

Nozick, Richard Posner, and Steven Shavell, see Mitchell N. Berman, *The Evidentiary Theory of Blackmail*, 65 U. CHI. L. REV. 795, 800–20 (1998) [hereinafter *The Evidentiary Theory*]; *Blackmail*, *supra* note 36, at 41–51; Christopher, *supra* note 23, at 750–60.

⁴³ See HARMLESS WRONGDOING, *supra* note 16, at 240–76.

⁴⁴ See *The Evidentiary Theory*, *supra* note 42; Mitchell N. Berman, *Meta-Blackmail and the Evidentiary Theory: Still Taking Motives Seriously*, 94 GEO. L.J. 787 (2006) [hereinafter *Meta-Blackmail*]; *Blackmail*, *supra* note 36.

⁴⁵ See Fletcher, *supra* note 31, at 1618.

⁴⁶ See Gorr, *supra* note 21.

⁴⁷ See Lindgren, *supra* note 34.

⁴⁸ See Block, *supra* note 23.

⁴⁹ Christopher, *supra* note 23.

⁵⁰ J.S. MILL, ON LIBERTY IN FOCUS 72–107 (John Gray & G.W. Smith eds., 1991) (1859).

⁵¹ 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS (1984) [hereinafter HARM TO OTHERS]; 2 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS (1985); HARM TO SELF, *supra* note 14; HARMLESS WRONGDOING, *supra* note 16.

may commonly believe that it is immoral to engage in certain kinds of conduct, despite the fact that the conduct does not wrongfully harm or offend anyone, e.g., homosexuality, prostitution, polygamy. But criminalizing such conduct is a form of "legal moralism" or "legal paternalism" that Feinberg believes is no business of the state.⁵²

Given Feinberg's premise that the proper aim of criminal punishment is to prevent wrongful harm and offense to others, it follows that the first step is to identify harms and offenses that constitute moral wrongs. If an event constitutes a wrongful harm or offense, criminal law may presumptively be invoked to punish actors who actually inflict it as well as those who threaten or offer to inflict it. By the same token, however, if an event does *not* constitute a wrongful harm or offense, criminal law may not be legitimately employed to punish either those who actually inflict it or those who threaten or offer to inflict it.

Feinberg's theory of blackmail derives from the foregoing theory of criminalization. If either the unconditional act of disclosing embarrassing information or the unconditional act of keeping incriminating information secret is a morally wrongful harm, the criminal law can legitimately be invoked to punish those who conditionally threaten or offer to commit such a wrongful act. Thus, if it is morally wrong to disclose or refrain from disclosing another's adultery (and Feinberg believes that *disclosure* is sometimes morally wrong within jurisdictions in which adultery is not a crime, and that *non-disclosure* is always wrong in jurisdictions in which it is a crime),⁵³ then the criminal law can legitimately punish those who conditionally threaten or offer to commit such acts depending upon whether they are paid. Alternatively, if unconditional acts of disclosure and non-disclosure are not morally wrongful harms, the criminal law may not be legitimately used to punish those who conditionally threaten or offer to commit such acts. Thus, if it is morally permissible to disclose and to refrain from disclosing another's adultery (and Feinberg believes that disclosure and non-disclosure are both sometimes permissible within jurisdictions in which adultery

⁵² HARM TO OTHERS, *supra* note 51, at 12-15.

⁵³ Feinberg thinks it is sometimes a wrongful violation of B's privacy for A to publish facts concerning B's private sexual life, including B's having engaged in adultery within a jurisdiction in which adultery is not a crime. HARMLESS WRONGDOING, *supra* note 16, at 245-50. At the same time, as we shall see in Part IV.B., Feinberg believes that it is morally wrong to *refrain* from disclosing adultery—and, hence, to offer to refrain from disclosing it—within jurisdictions in which adultery is a crime. *Id.* at 241-45. Adultery is *literally* a crime in nearly half of U.S. jurisdictions. However, except for the U.S. military, where it is regularly prosecuted as a military offense, adultery is not *actually* a crime in the 50 states, and, hence, not a crime for Feinberg's purposes, because it is not actually prosecuted. See Melissa Ash Haggard, *Adultery: A Comparison of Military Law and State Law and the Controversy This Causes Under Our Constitution and Criminal Justice System*, 37 BRANDEIS L.J. 469 (1998).

itself is not a crime),⁵⁴ then it is not wrong to threaten to disclose it and offer not to, depending upon whether one is paid.⁵⁵

George Fletcher's approach is very different from those of Feinberg. Fletcher believes that *threats* to disclose adultery are morally wrongful even when the disclosures themselves are not. The difference between threats to disclose and disclosures themselves, Fletcher says, is that disclosures are one-time events that, once they occur, are over and done with and, therefore, fail to subject persons to the harm that criminal law paradigmatically seeks to prevent—namely, relationships of continuing “domination” or “subordination.”⁵⁶ In contrast, by virtue of making a biconditional proposal regarding adultery—that is, by linking a threat to disclose to an offer to suppress—an agent, A, subjects his target, B, to a potentially indefinite relationship of subordination to A's will. B cannot free himself from A's domination by paying A hush money because, although B's hush-money contract with A may be legally valid, it is effectively unenforceable because B cannot bring suit upon it without disclosing the very thing he seeks to hush up. As a result, A is effectively free to subject B to a continuing fear and helplessness by threatening to return for more and more money, regardless of B's efforts to free himself from A's control.⁵⁷

III. SIGNIFICANT CATEGORIES OF BLACKMAIL

The crime of blackmail is traditionally stated as a generic prohibition rather than an enumeration of multiple forms of prohibited conduct. Again, the Kansas statute is a good example:

Kansas Criminal Code § 64(a) (2010)

Blackmail is gaining or attempting to gain anything of value or compelling another to act against such person's will, by threatening to communicate accusations or statements about any person that would subject such person or any other person to public ridicule, contempt or degradation.⁵⁸

⁵⁴ See HARMLESS WRONGDOING, *supra* note 16, at 247, 249.

⁵⁵ To be sure, Feinberg says, blackmail is typically a form of “exploitation,” the blackmailer being an “unproductive parasite who sells relief from danger that would not exist if he had not created it,” enabling him to “profit unproductively from others' wrongdoing,” much like some others who drive “hard commercial bargain[s].” *Id.* at 239–40. And in egregious cases, he believes, blackmail may be compelled to disgorge their gains. *Id.* at 220. But it is a form of “legal moralism” that is “repugnant to . . . liberalism,” *id.* at 240, to subject them to criminal punishment for threatening and offering—and deriving gains and things from threatening and offering—to commit acts that do not wrongfully harm anyone.

⁵⁶ See Fletcher, *supra* note 31, at 1627, 1629–35.

⁵⁷ *Id.* at 1626.

⁵⁸ KAN. STAT. ANN. § 21-5428a (2011).

Generic prohibitions like Kansas's are useful for some purposes. However, because the purpose of this essay is to determine how much of the traditional crime of blackmail ought to be criminalized, it may be useful to subdivide what Kansas defines as blackmail into its constituent categories.

Blackmail can be subdivided in various ways, depending upon the criterion that one chooses. The criterion one chooses, in turn, should facilitate one's larger purposes. Our purpose is to try to identify which instances of blackmail, if any, can be justly criminalized, starting with the least controversial instances and moving to more contested ones. The least controversial way to morally justify criminalizing instances of blackmail is to show that they are subsets of extortion—that is, to show that the moral wrongfulness of an actor's threats to disclose and offers to withhold disclosure is a function of the moral wrongfulness of the disclosures and non-disclosures themselves.

Accordingly, I begin with what blackmail threats and offers *involve*. They involve the disclosure and non-disclosure of information that, if disclosed, would subject a person to what Kansas calls "ridicule, contempt or degradation." That is, they regard information that, if disclosed, would subject a person to criminal prosecution and/or embarrass him in the eyes of others. I then subdivide the totality of what Kansas punishes as blackmail into five subsets of biconditional proposals, based, in turn upon five distinct kinds of unconditional acts of disclosure or nondisclosure, starting with unconditional acts whose moral wrongfulness is most manifest.

In short, what Kansas defines as blackmail consists of:

Biconditional proposals regarding the disclosure and non-disclosure of information that, if unconditionally disclosed, would incriminate and/or embarrass a person in the eyes of others, where—

- (1) The information is *false*.
- (2) The information is true but also *incriminating*, such that refraining from disclosing it to public authorities would obstruct the state's ability to criminally prosecute a person.
- (3) The information is true and non-incriminating, but it was obtained by *wrongfully intruding upon a person's private domain*.
- (4) The information is true, non-incriminating and obtained without wrongfully intruding upon a person's private domain, but disclosing it would reveal matters that are *private* and of *no legitimate interest to the public or to individual disclosees*.

or

- (5) The information is true, non-incriminating, and obtained without wrongfully intruding upon a person's private

domain, but, although it is otherwise private, disclosing it is *not wrongful* given what is known of the legitimate interests of the public or individual disclosees.

IV. NON-PARADOXICAL CATEGORIES OF BLACKMAIL

Consider the supposed difference between extortion and blackmail. There is nothing paradoxical about the crime of extortion, commentators say, because extortion consists of threats to perform acts that are themselves criminal.⁵⁹ In contrast, the crime of blackmail is paradoxical, commentators say, because it consists of threats to perform acts that, according to them, one has a “legal right,”⁶⁰ a “lawful right,”⁶¹ and a “moral and legal right” to do.⁶² In reality, however, most of the five categories that Kansas punishes as blackmail are scarcely more paradoxical than ordinary extortion. Specifically, Categories 1–4 involve biconditional proposals that are criminal because they threaten and offer to do things that, if done unconditionally, are not only moral wrongs but typically “legal” wrongs as well, albeit not *criminal* wrongs.

A. Category 1: Biconditional proposals regarding disclosures of incriminating or embarrassing information that is false

All Anglo-American jurisdictions regard it as tortiously wrongful to defame a person, that is, to publish false information about him that subjects him to ridicule, contempt, or degradation.⁶³ Most jurisdictions also regard it as tortiously wrongful to place a person in “false light” that is highly offensive.⁶⁴ They do so, moreover, because they regard it as morally wrong to falsely impugn a person’s reputation. To be sure, jurisdictions typically require as a condition of liability that actors also possess culpability, such as negligence, regarding the information’s falsity.⁶⁵ And the U.S. Supreme Court further requires as a condition for liability in instances regarding public officials or public figures that actors possess “actual malice” in the form of knowledge that the information is false or reckless disregard of its falsity.⁶⁶ The latter are standards of culpability, however, not reflections on the

⁵⁹ See *supra* note 29.

⁶⁰ DeLong, *supra* note 27, at 1663 (“The criminalization of blackmail has been considered paradoxical because it would make unlawful a threat to do something the threatener has a legal right to do.”).

⁶¹ Ginsburg & Shechtman, *supra* note 2, at 1873 (“[T]he apparent paradox of blackmail [is] that one may not threaten to do what one has a lawful right to do . . .”).

⁶² See Lindgren, *supra* note 34, at 670.

⁶³ See RESTATEMENT (SECOND) OF TORTS § 580B (1977).

⁶⁴ See RESTATEMENT (SECOND) OF TORTS § 652E (1977).

⁶⁵ See DAN B. DOBBS, THE LAW OF TORTS 1172 (2000).

⁶⁶ See *id.* at 1169–70, 1178–79.

wrongfulness of an actor's conduct. The wrongful conduct itself consists of publishing false information that subjects a person to ridicule, contempt, or degradation, regardless of the state of mind with which it is done.

Now consider an actor who threatens unless compensated to disclose such false information and offers otherwise to withhold it. The threat is a serious moral wrong, and hence criminalizable, because the disclosure itself is a serious moral wrong.⁶⁷ To be sure, actors who publish false information may be unaware that it is false. But it is unlikely that an actor who *threatens* to publish false information is unaware of its falsity. An actor cannot threaten to disclose information without communicating with his victim, who is likely to tell him that the information is false. An actor who nonetheless continues to threaten disclosure is very likely negligent and probably reckless regarding its falsity.

Feinberg agrees that criminalizing biconditional proposals regarding disclosures of false and defamatory information is consistent with the harm principle.⁶⁸ But Feinberg is uneasy about having to rely on *torts* rather than *criminal law* as evidence of the moral wrongfulness of such disclosures, for he states that it would be "tidier" if such acts were criminal rather than merely civil wrongs.⁶⁹

Feinberg's unease appears to stem from something as follows:

Major premise: When an unconditional act is not morally wrongful enough to be a crime, a conditional threat to do the same thing is not morally wrongful enough to be a crime either.

Minor premise: When an unconditional act is treated as a tort rather than a crime, it is because it is not morally wrongful enough to be a crime.

Conclusion: Therefore, when an unconditional act is treated as a tort rather than a crime, a conditional threat to do the same thing is not morally wrongful enough to be a crime.

The problem lies in Feinberg's minor premise. Criminal law differs from torts along numerous dimensions, including the severity of criminal sanctions and

⁶⁷ See Gorr, *supra* note 21, at 47, 52; cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact."); Fletcher, *supra* note 31 (arguing that, while serious moral wrongs may justify criminalization, minor ones do not); Leo Katz, *Blackmail and Other Forms of Arm-Twisting*, 141 U. PA. L. REV. 1567, 1598 (1993) ("[A disclosure is the basis for criminalizing blackmail if it] is immoral, even though not criminal or even tortious.").

⁶⁸ See HARMLESS WRONGDOING, *supra* note 16, at 256–58.

⁶⁹ *Id.* at 251.

criminal law's singular capacity to express moral blameworthiness.⁷⁰ Because of those features, criminal law is uniquely equipped to condemn and deter the most frightful and socially-destabilizing moral wrongs, including acts of personal violence, threats to public order, and offenses against the state.⁷¹ However, the law of torts also possesses condemnatory and deterrent features, particularly with respect to intentional torts that carry punitive damages,⁷² rendering it an appropriate vehicle for addressing non-violent wrongs, such as intentional violations of reputation and dignity that would otherwise be criminalized. Indeed, intentional acts that are sufficiently wrongful to be criminalized perhaps *ought* to be relegated instead to the law of torts whenever private law is an adequate means of prevention, because tort is less intrusive upon individuals than criminal law and less burdensome upon the state to enforce.⁷³ Thus, the fact that unconditional disclosures in categories 1, 3, and 4 are torts rather than crimes does not mean that, if private law were unavailing, they would be deemed unworthy of criminalization.

Nevertheless, this raises a question: why, if the prevention of unconditional disclosures of embarrassing information can be relegated to tort law, should the prevention of biconditional proposals regarding such disclosures—that is, the prevention of blackmail itself—be *criminalized*? Significantly, the answer lies in the nature of blackmail. Private law is competent to redress the wrongs of unconditional disclosures, but it is incapable of redressing the wrongs of blackmail. Unconditional disclosures inflict harm that is entirely public, and, therefore, private plaintiffs are fully able to respond to them in public. In contrast, conditional threats of disclosure are made in private, and when they are successful—that is, when they result in the payment of hush money—they remain a secret. Private plaintiffs who choose to pay hush money are incapable of redressing the wrongs of blackmail through litigation, because redressing them means going public about the very thing they are determined to keep secret.⁷⁴ Criminal sanctions in the relatively few instances of blackmail that ever come to

⁷⁰ See generally Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201 (1996); Kenneth W. Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719 (2008).

⁷¹ See ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 34–45 (1991).

⁷² Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195 (1985); Simons, *supra* note 70, at 725–26, 728, 731–32.

⁷³ See ASHWORTH, *supra* note 71, at 28–29; cf. Simons, *supra* note 70, at 731 (“Perhaps criminal law should be employed whenever tort law would be an ineffective deterrent . . .”).

⁷⁴ See Altman, *supra* note 22, at 1659 (“[C]ivil remedies are a less practical solution [than criminal remedies] to coercion and exploitation in blackmail cases. Blackmail cannot be addressed by contract law because of the problems of monitoring promises to keep embarrassing secrets.”); Delong, *supra* note 27, at 1690 (“The victim is not only injured, but is silenced and isolated by the threat. He cannot complain or seek help for his dilemma without abandoning that which he wants to preserve.”); Posner, *supra* note 38, at 1837 (“The blackmail victim does not want to reveal his secret to the police [because] in a public trial of the blackmailer, the secret may leak out . . .”).

light are appropriate because relegating a plaintiff to private litigation would expose him to the very injury from which the law seeks to protect him.⁷⁵

B. Category 2: Biconditional proposals regarding non-disclosures of information that is incriminating

The second category consists of so-called "crime exposure blackmail,"⁷⁶ that is, biconditional proposals regarding the nondisclosure of information that is not only embarrassing but also *incriminating*. Crime-exposure blackmail differs from Category 1 where the unconditionally wrongful act that renders the biconditional proposals about it wrongful consists of what A threatens to do (i.e., the act of disclosing embarrassing information), and where the victim of such acts is an individual (i.e., the person being embarrassed). In crime-exposure blackmail, the unconditionally wrongful act, if any, that renders the s about it wrongful consists of what A *offers* to do (i.e., keep incriminating information secret), not what A threatens to do. And A's victim, if any, is the public from whom he proposes to conceal criminal wrongdoing, not the individual whom he rightly threatens to incriminate.⁷⁷ This is not to say that unconditional acts of silence are wrongful. That remains to be explored. The point is that *if* biconditional proposals regarding incriminating information are morally wrongful by virtue of the acts they propose, it is not—as some commentators maintain⁷⁸—because A subjects his target to the burden of moral "coercion" by threatening to leave his target worse off than A ought to leave the target.⁷⁹ It is because A offers to suppress incriminating

⁷⁵ Cf. Posner, *supra* note 38, at 1837. The 19th century English criminalization of blackmail was as much a reaction against *false* allegations of infamous crime as true allegations. See McLAREN, *supra* note 2, at 28–29.

⁷⁶ *The Evidentiary Theory*, *supra* note 42, at 860.

⁷⁷ See *Normative Functions*, *supra* note 17, at 82–83. Scott Altman claims that "most people" possess the "intuition" that the real "victims" of blackmail—including, presumably, crime-exposure blackmail—are not "third parties" but the woeful persons to whom the proposals are made, and that blackmail theories are defective to the extent that they cannot account for that intuition. See Altman, *supra* note 22, at 1652, 1654–55. People ought, indeed, to possess that intuition with respect to blackmail proposals in Categories 1, 3–5 because the targets of such proposals are, indeed, the victims of *prima facie* moral wrongs. However, one must wonder whether the intuition also extends to targets of crime-exposure blackmail who, far from being moral victims, are putative accomplices to obstruction of justice. See Gorr, *supra* note 21, at 47, 64 (targets of crime-exposure blackmail who pay hush money are guilty of obstruction of justice); Scalise, *supra* note 22, at 1509–10 (same). To be sure, people may sympathize with those in distress, even if the distress is deserved. But if people feel moral sympathy for the targets of crime-exposure blackmail—that is, if they truly feel that the targets of crime-exposure blackmail are morally "wronged" (as Altman puts it)—their moral sympathies are misguided.

⁷⁸ George Fletcher and Leo Katz both maintain that the moral wrong of blackmail, including crime-exposure blackmail, consists of its subjecting its targets to "coercion." See Fletcher, *supra* note 31, at 1637; Katz, *supra* note 67, at 1574.

⁷⁹ Moral coercion is measured by a moral baseline, the baseline consisting of where it is minimally permissible for A to leave his target in response to the target's rejecting A's offer. Crime-

evidence that the public has a substantial and legitimate interest in being disclosed.⁸⁰

The question thus remains: is it morally wrong for A to fail to disclose to the authorities information within his possession that B may be guilty of an unsolved crime? Feinberg believes the answer is yes. Feinberg argues that citizens have a moral “duty”⁸¹ to the public to disclose such information to the authorities, much as witnesses have a duty to testify. Thus, because it is morally wrong to fail to disclose the information, it is also morally wrong and, hence, criminalizable, to offer to do so.⁸²

Unfortunately, Feinberg’s argument faces an obstacle with respect to crime-exposure blackmail that is absent in Category 1. The problem is that, in contrast to acts of defamation in which claims of moral wrongdoing find support in the law, the claim that citizens have a moral duty to report criminal wrongdoing to the police finds no corroboration in law. To be sure, failure to report criminal wrongdoing may have historically been an offense of “misprision of felony” in England. But misprision of felony is no longer an offense in the United States, if it ever was one, and it is “practically obsolete” in England.⁸³ And because the victim of non-reporting is the public rather than an individual, it is not a tort either.

This is not to say that acts that are not already criminal must be tortious in order to constitute criminalizable moral wrongs. A jurisdiction may have legitimate reasons for not having criminalized or made tortious an act that is nevertheless a serious moral wrong, e.g., a lack of time or pressing need to assess the issue. Yet that does not explain why the unconditional acts that underlie crime-exposure blackmail are not a crime. It is not because of legislative neglect that jurisdictions refuse to criminalize failures to report crimes. It is because they have affirmative misgivings—misgivings that Feinberg admits that he himself possesses⁸⁴—about punishing persons who typically possess information regarding criminal wrongdoing. Persons who typically possess such information fall into two classes: (i) social and family intimates of the suspected offender; and/or (ii) persons who fear that their identities would become known and they would suffer retaliation if they became informers. Jurisdictions are reluctant to punish persons for what is essentially an omission when compliance would require them to betray

exposure blackmail can validly be characterized as “coercive,” provided that “coercion” is measured by a non-moral baseline. For commentators who characterize crime-exposure blackmail as “coercive” by defining coercion by non-moral baselines, see Lamond, *supra* note 15, at 216; and Lindgren, *supra* note 27, at 1701.

⁸⁰ See Gorr, *supra* note 21, at 64 (a target of crime-exposure blackmail who pays hush money is guilty of obstruction of justice).

⁸¹ Feinberg, *supra* note 16, at 241.

⁸² *Id.* at 241–45, 363 n.48.

⁸³ See WAYNE R. LAFAVE, CRIMINAL LAW § 13.6(b) (4th ed. 2003). Specialized statutes do exist, however, that make it a criminal offense for certain persons, e.g., physicians, to fail to report certain kinds of offenses, e.g., child abuse.

⁸⁴ HARMLESS WRONGDOING, *supra* note 16, at 244.

family members or social intimates or to place themselves at risk of retaliation. Indeed, Feinberg himself admits as much. Despite trying to dismiss the latter concerns as mere “practical difficulties,”⁸⁵ Feinberg concedes that the difficulties consist of moral reluctance to punish certain classes of persons who have respectable reasons for remaining silent.

Despite these problems, I think Feinberg is right about crime-exposure blackmail. Jurisdictions can criminalize crime-exposure blackmail consistently with the harm principle while fully respecting their legitimate misgivings about punishing unconditional acts of misprision of felony. The reason lies in a novel and important insight by Mitchell Berman in 1998 concerning the relationship between *biconditional proposals* regarding the non-disclosure of incriminating information and the *non-disclosures* themselves.⁸⁶ Berman argues that (1) by virtue of making a biconditional proposal, an actor, A, provides *evidence* of something significant regarding the disclosures and non-disclosure he proposes in the event he were to make them; (2) the evidence he provides is that, were he to make the disclosure or non-disclosure, it would be with a *blameworthy motive*; (3) acting with a blameworthy motive transforms any disclosure or non-disclosure he might make into a *wrongful harm*; and (4) because the disclosures or non-disclosure would be a wrongful harm if the actor were to make them, the actor’s biconditional proposal regarding them is wrongful, too.

I will return to Berman’s theory of motive in Part V in addressing categories of blackmail that are difficult to square with the harm principle. We will see that, although Berman’s emphasis on motive appears to be consistent with popular intuitions about blackmail, it is problematic for several reasons. Nevertheless, even if Berman is mistaken about the relationship between motive and harm—that is, even if Steps 2–4 of his argument are flawed—Step 1 of his argument remains valid. And Step 1 shows that, by virtue of the distinctive reasons that jurisdictions refrain from punishing crime-exposure blackmail, an actor who makes a BP regarding incriminating information can be justly punished for offering to refrain from informing the authorities.

The argument is this: by virtue of making a biconditional proposal regarding incriminating information—that is, by threatening to inform the police—an actor, A, reveals that he is *not* someone with intimate relationships that he is unwilling to betray and *not* someone who fears retaliation by becoming a snitch. He thus reveals himself to be someone who has no respectable justification or excuse for failing to notify the authorities of suspected wrongdoing. And, because he has no justification or excuse for unconditionally remaining silent, he has none for conditionally offering to remain silent.⁸⁷

⁸⁵ *Id.* at 244–45.

⁸⁶ *The Evidentiary Theory*, *supra* note 42; see also *Meta-Blackmail*, *supra* note 44.

⁸⁷ Donald Dripps argues that crime-exposure blackmail is not morally wrong but rather politically wrong because when an actor takes money from a criminal wrongdoer, he “usurps” the exclusive political authority of the state to punish criminal wrongdoers by substituting a monetary fine for the state’s range of sanctions, and he does so without the procedural safeguards that ought to

Berman's evidentiary insight regarding crime-exposure blackmail not only remedies a weakness in Feinberg's theory, it possesses none of the flaws that arguably underlie Berman's motivational view of criminal responsibility generally. We will see that Berman can be criticized for arguing that motivation can transform completed acts that are otherwise permissible into completed acts that are wrongful. Even if these criticisms are valid, however, they do not apply here. For, unlike Berman's analysis of other categories of blackmail, and despite what he says, his analysis of crime-exposure blackmail is *not* motivational in nature. The reason an actor's threat to disclose incriminating information is inculpatory is not that it reveals that, were he to suppress the information, he would be *motivated by hostility to the public*. The threat is inculpatory because (1) it shows that certain justificatory and excusing conditions for suppressing the information are simply *absent*, i.e., intimacy with a suspect or fear of retaliation that might inhibit an actor from informing the police, and (2) the absence of justificatory and excusing conditions reveals him to be a person who is acting wrongfully by virtue of conditionally offering to do what it is wrongful for him to unconditionally do, i.e., withhold incriminating information from the authorities.

To be sure, a jurisdiction could simply enact a misprision of felony statute with explicit defenses of justification or excuse for persons who are intimate with suspects or who fear retaliation if they inform the police. However, it is not surprising that legislatures do not do so. The issue typically possesses too little salience to justify legislative attention. Legislatures may also prefer using crime-exposure blackmail in lieu of misprision of felony statutes to punish persons whose failure to inform the police is unjustified. Blackmail statutes implicitly operate to convict actors who lack justification for failing to inform the police—while also operating to exempt persons whose failure to inform may be justified—without requiring legislatures to recognize intimacy and fear of retaliation as explicit defenses and without putting courts to the trouble of adjudicating issues regarding intimacy and fear of retaliation.

C. Category 3: Biconditional proposals regarding the disclosure of information that was obtained through wrongful intrusion upon a person's private domain

A photographer contracted with young Cameron Diaz, who was then unknown, to take topless photos, agreeing not to release the photos without Diaz's permission. Diaz never signed a release. Nevertheless, when Diaz became famous, the photographer threatened to publish the photos unless Diaz paid him

accompany criminal punishment. See Dripps, *supra* note 1, at 254–59. However, secret payments by criminal wrongdoers to private persons are not punishments within the meaning of the Fifth, Sixth and Eighth Amendments. And they do not preclude the state from acting on its own to punish criminal wrongdoers.

hush money to keep them confidential. The photographer was tried and convicted of attempted blackmail.⁸⁸

The actor Mel Gibson's former girlfriend allegedly recorded telephone conversations between the two of them in California without Gibson's permission. She then allegedly threatened to disclose the conversations to the media unless he paid her hush money to keep them confidential. It is a tort in California, as well as a crime, to record a telephone conversation with another person without the latter's permission.⁸⁹

There is nothing paradoxical about it being a crime for a photographer to be convicted of threatening to do what it was not a crime for him actually to do, viz., publish topless photos of a famous actress.⁹⁰ It is a breach of contract, enforceable by an injunction under penalty of contempt, to break a bargained-for promise to keep photographs confidential absent permission to release them. To be sure, breaches of promise are rarely criminalized because civil relief is typically adequate. However, criminalizing threatened breaches of promise is an appropriate deterrent in cases like Diaz's because an actress who is threatened with the publication of embarrassing photos cannot sue to enjoin their publication without disclosing the existence of the very thing she wishes to keep secret.⁹¹

By the same token, even if it were merely a tort in California for a person to secretly record one's telephone conversations with another without the latter's permission (rather than it also being a crime), there would be nothing paradoxical about it being a crime in California to threaten to release such conversations. It is a tort in California to record telephone conversations without permission because California considers it a wrongful violation of privacy. Criminalizing threats to

⁸⁸ See Michelle Caruso, *Photographer Convicted of Trying to Blackmail Cameron Diaz*, NEW YORK DAILY NEWS (July 25, 2005, 12:00AM), http://seattletimes.nwsourc.com/html/nationworld/2002402001_webdiaz25.html.

⁸⁹ Carly Crawford, *Leaked Tapes Were Part of Extortion [sic] Attempt from Ex-Girlfriend Grigorieval, Says Mel Gibson*, THE COURIER MAIL (July 23, 2010, 12:01AM), <http://www.couriermail.com.au/entertainment/confidential/leaked-tapes-were-part-of-extortion-attempt-from-ex-girlfriend-grigorieval-says-mel-gibson/story-e6freq7o-1225895820742>.

⁹⁰ Some commentators argue that there is no right to privacy regarding true information that, if disclosed, would undermine a person's reputation by revealing his good reputation to be undeserved. See Jeffrie G. Murphy, *Blackmail: A Preliminary Inquiry*, 63 MONIST 156, 162 (1980) ("It is unclear to me how you can have a right to the reputation of being a person of type X if in fact you have performed acts of type Y where Y acts are inconsistent with being an X person."); Scalise, *supra* note 22, at 1485-86, 1506-07, 1510-11. If Murphy and Scalise were correct, however, it would lead to the counterintuitive conclusion that people would have no right to privacy regarding true but embarrassing information that is obtained through criminal trespass.

⁹¹ Cf. Gorr, *supra* note 21, at 46-47 n.9 (arguing that there is nothing paradoxical about punishing a person for threatening to disclose information that it would be tortious to disclose, including breaches of contractual confidentiality); Isenbergh, *supra* note 22, at 1905-06 ("A key element of 'pure' blackmail . . . is that B is initially free to make the disclosure over which he bargains with A. [Such] [b]lackmail . . . does not include threats of disclosure barred by statute or contract, such as a doctor's threat to reveal a patient's loathsome disease, which belong to the broader class of 'extortion.'").

publish tortiously-recorded conversations is appropriate because suits for damages following disclosure are inadequate to protect victims from the injury that the tort is designed to prevent.

The real and alleged threatened disclosures in Diaz's and Gibson's cases are threatened violations of privacy of a distinctive kind: they are cases in which an actor, A, threatens to reveal embarrassing information about B that A gained access to, or control of, *by normatively inappropriate means*. The Restatement (Second) of Torts generalizes by making it an aggravated violation of B's privacy for A to disclose to anyone else embarrassing information that A obtains by "intentionally intrud[ing], physically or otherwise, upon the solitude or seclusion of [B] or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person."⁹² To illustrate, the commentary to section 652B states that A violates section 652B by disclosing information that he obtains by "forc[ing] his way into [C's] room in a hotel or insist[ing] over [C's] objection in entering his home" or "with or without mechanical aids . . . oversee[ing] or overhear[ing] [C's] s private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires," or "opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents."⁹³

The Restatement does not consider cases in which A *threatens* to disclose information that, if disclosed, would violate B's right of privacy in tort. However, there is nothing paradoxical about criminalizing such threats. The Restatement treats unconditional disclosures of such information as tortious because it regards the unconditional disclosures as morally wrongful. Threats to make such disclosures can be justly criminalized because the disclosures themselves are morally wrongful and civil remedies are inadequate to deter the threats.

D. Category 4: Biconditional proposals regarding the disclosure of information about private matters of no legitimate interest to the public or to individual disclosees

As have just seen, Category 3 involves wrongful violations of privacy that are a function in part of the illicit *manner* in which information is obtained. Illicit trespass, wiretapping, eavesdropping, and breach of confidential agreements are wrongful intrusions of privacy—as well as any disclosure of information they produce—regardless of how famous the person is or how interesting the information. Thus, whether the victim is Cameron Diaz or a person of no interest

⁹² RESTATEMENT (SECOND) OF TORTS § 652B (1965) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."); *see id.* § 652D cmt. a, illus. 3; *id.* § 652A, cmt. d.

⁹³ *Id.* § 652B cmt. b.

to the public, an illicit intrusion and disclosure of information it produces remain wrongful violations of privacy.

In contrast, the information at issue in Category 4 is true information the rightful privacy of which is solely a function of its *content*. Category 4 involves information that is rightfully private when an individual's legitimate interest in preventing the information from being disclosed is greater than the legitimate interest of others in its being disclosed. Section 652D of the Restatement of Torts addresses precisely such information, rendering disclosures of it actionable.

Section 652D makes it a tort to publicize matters concerning another's "private life" when doing so is highly offensive to a reasonable person and the information is "not of legitimate concern to the public"⁹⁴—matters which typically include "[s]exual relations . . . family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget."⁹⁵

Violations under section 652D fall into three areas, all of which involve disclosures of information regarding a person's private life, provided, of course, that the information is not of legitimate concern to the public or to disclosees:

Disclosures to the public at large of matters not of public record.

The Restatement is centrally concerned with disclosures to the "public at large" (or to a sufficient number of people to be equivalent to the public at large) of private information that is not already a matter of "public record." Therefore, violations of privacy under section 652D do not normally include disclosures to single or isolated individuals⁹⁶ or disclosures of information that is already a matter of public record.⁹⁷

Disclosures to single or isolated individuals. Nevertheless, the Restatement invites jurisdictions to decide that the tort also includes disclosures of private information to single individuals,⁹⁸ and some jurisdictions have accepted the invitation. Michigan has held that disclosure of embarrassing information to even a single person can be actionable if the person and victim of disclosure have a special

⁹⁴ *Id.* § 652D ("One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."); *but cf.* *Humphers v. First Interstate Bank of Oregon*, 696 P.2d 527 (Or. 1985) (preferring to frame breaches of confidentiality as a tort independent of tortious violations of privacy).

⁹⁵ RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1965).

⁹⁶ *See id.* § 652D cmt. a.

⁹⁷ *See id.* § 652D cmt. b, d.

⁹⁸ *See id.* § 652D illus. 3.

relationship such as “fellow employees, club members, church members, family or neighbors.”⁹⁹

Disclosures of matters of public record that lapses of time render private. The Restatement also contemplates making it actionable to reveal facts of public record regarding events that occurred long ago with respect to persons who have since transformed their lives for the better,¹⁰⁰ such as, perhaps, information that a woman who is a now respectable middle-aged wife and mother was arrested once for prostitution as a teenager.¹⁰¹ To be sure, the U.S. Supreme Court has held that matters of public record are normally constitutionally privileged.¹⁰² However, the Court has yet to decide a case involving information that, by virtue of lapse of time, is no longer a matter of public significance and that was disclosed for the purpose of embarrassing its victim.¹⁰³ Instead, it has stressed the importance of resolving conflicts between public records and privacy within the particular contexts in which they arise.¹⁰⁴

Once again, there is nothing paradoxical about criminalizing biconditional proposals regarding information that, if disclosed, would be an actionable wrong.

⁹⁹ *Beaumont v. Brown*, 257 N.W.2d 522, 531 (Mich. 1977); *see also* *McSurely v. McClellan*, 753 F.2d 88, 88, 112 (D.C. Cir. 1985); *Miller v. Motorola, Inc.*, 560 N.E.2d 900, 903–04 (Ill. 1990).

¹⁰⁰ *See* RESTATEMENT (SECOND) OF TORTS § 652D, cmt. k:

The fact that there has been a lapse of time . . . of considerable length since the event that has made the plaintiff a public figure . . . is . . . a factor to be considered, with other facts, in determining whether the publicity goes to unreasonable lengths in revealing facts about one who has resumed the private, lawful and unexciting life led by the great bulk of the community. This may be true, for example, when there is a disclosure of the present name and identity of a reformed criminal and his new life is utterly ruined by revelation of a past that he has put behind him.

¹⁰¹ *Cf.*, *Melvin v. Reid*, 297 P.91 (Cal. App. 1931) (former prostitute). *See* *Roshto v. Hebert*, 413 So.2d 927 (La. App. 1982) (holding that it can be actionable to reveal the present identity of persons who were convicted of a non-violent crime decades earlier, if the persons have become rehabilitated members of society, where identifying them as a former criminals would be highly offensive and injurious to a reasonable person, the information is published with reckless disregard for its offensiveness, and no independent justification for revealing their identities exists), *rev'd on other grounds*, 439 So.2d 428 (1983). *But cf.*, *Gates v. Discovery Communications, Inc.*, 101 P.3d 552 (Cal. App. 2004), *overruling* *Briscoe v. Reader's Digest Ass'n, Inc.*, 101 P.3d 552 (Cal. App. 1977).

¹⁰² *See* *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492–93 (1975).

¹⁰³ *See* *Florida Star v. B.J.F.*, 491 U.S. 524, 536–37 (1989).

¹⁰⁴ *See id.* at 533.

V. PARADOXICAL BLACKMAIL

Categories 4 and 5 are mirror images of one another. They both involve biconditional proposals regarding true and non-incriminating information, the rightful privacy of which depends solely upon which is greater—the individual's legitimate interest in preventing disclosure, or the legitimate interest of others in it being disclosed. The difference between them is the balance of those respective interests. In Category 4, the individual's legitimate interest in privacy is morally superior to the legitimate interest of others in disclosure. In contrast, in Category 5, the moral balance is otherwise. Category 5 consists of biconditional proposals regarding information the disclosure of which is not morally culpable, whether because (1) the public's interests in disclosure is morally *superior* to the individual's interests in privacy, so that an actor is morally obliged to disclose;¹⁰⁵ (2) the two sets of interests are in moral *equilibrium*, so that an actor is morally permitted to disclose or not disclose, whichever he prefers;¹⁰⁶ or (3) the balance between disclosure and privacy remains morally *indeterminate* at the time a person acts, so that an actor cannot be blamed regardless of whether he discloses the information or not.¹⁰⁷

Category 5 thus presents the paradox of blackmail in its classic form. To illustrate, consider two cases, one of which involves the *public's* interest in disclosure, the other of which involves a *single individual's* interest in disclosure:

¹⁰⁵ The public's legitimate interest in true but embarrassing information about public officials that bears upon their fitness for office is morally superior to their interest in privacy. Cf. *New York Times v. Sullivan*, 376 U.S. 254, 272–73 (1964).

¹⁰⁶ The relationship between the privacy interests of voluntary celebrities and the public's interest in their lives may be an example. Thus, although it is difficult to maintain that the public's interest in knowing about David Letterman's consensual sexual conduct with a staff member is morally superior to Letterman's interest in privacy regarding his intimate relations, it is also difficult to say that Letterman's interest is morally superior to the public's interest in him.

¹⁰⁷ Disclosure to a married person that his or her spouse has committed adultery can be an example of cases in which it is unknown and, perhaps, unknowable at the time of disclosure whether the balance of interests favors disclosure or favors secrecy. See Gorr, *supra* note 21, at 55–56. See also Feinberg, *supra* note 16, at 247–48:

It is not always true that exposure of adultery would be socially useful, or . . . justly deserved, and even where that damage would be just and proper, it is often impossible for the exposor to *know* that. . . . [S]o many other subtle and morally relevant factors may be involved that no mere outside observer can know whether the *prima facie* wrong [of disclosure] is outbalanced by other morally relevant reasons.

David Letterman. Husband-1, who lives in a jurisdiction in which adultery is no longer a crime,¹⁰⁸ learns that his wife had an affair with her boss, David Letterman. Husband-1 threatens to reveal the affair to the public unless Letterman pays him \$2,000,000, to hush it up.¹⁰⁹

Mr. Littleman. Husband-2, who lives in a jurisdiction in which adultery is no longer a crime, learns that his wife had an affair with their neighbor, Mr. Littleman, whose wife (Mrs. Littleman) has previously said she would want to know if her husband were unfaithful. Husband-2 threatens to tell Mrs. Littleman about her husband's affair unless Mr. Littleman pays him \$10,000, to hush it up.

David Letterman is a public figure¹¹⁰ who frequently and publicly speaks about his recent marriage and newborn child. Letterman's nemesis, Husband-1, was therefore morally and legally free to commit the unconditional act of publicizing Letterman's adulterous affair and the unconditional act of selling the story to the tabloids, whether because the public's interest is superior to Letterman's or in equilibrium with it. By the same token, because Mrs. Littleman possesses a legitimate interest in knowing whether her husband has been faithful to his wedding vows, Husband-2 is morally and legally free to commit the unconditional act of informing her, whether because Mrs. Littleman's interests are superior to her husband's and others, in equilibrium with them, or indeterminate. Yet by virtue of Husband-1's offering in lieu of disclosure to do something that he reasonably believed David Letterman might prefer he do (i.e., keep the affair secret in return for \$2,000,000), Husband-1 fell afoul of the New York law of blackmail. And by virtue of Husband-2's offering to do something that he reasonably believed Mr. Littleman would prefer he do (i.e., keep the affair secret in return for \$10,000), Husband-2 committed what every Anglo-American jurisdiction regards as either blackmail or attempted blackmail.

"Letterman" and "Littleman" thus seem irreconcilable with Feinberg's harm principle: Husband-1 and Husband-2 are criminally punished for threatening to do what it is neither wrongful nor unlawful to do unconditionally. To heighten the paradox, "Letterman" and "Littleman" are anything but marginal instances of what the public regards as criminal blackmail. The reason the English law of blackmail was amended in the 19th century to encompass threats to do what it was otherwise lawful to do was to address what Victorians regarded as the social problem of blackmail regarding adultery. Far from being peripheral instances of blackmail,

¹⁰⁸ Adultery within the military is a violation of section 134 of the Code of Military Conduct and is punishable as a military offense. See *supra* note 53. Consequently, within the military, adultery blackmail is punishable as crime-exposure blackmail.

¹⁰⁹ See John Schwartz, *Torturing the Soul and Wringing the Nerves, the Art of Blackmail*, N.Y. TIMES, Oct. 4, 2009, at WK3, available at <http://www.nytimes.com/2009/10/04/weekinreview/04schwartz.html>.

¹¹⁰ Cf. DOBBS, *supra* note 65, at 1169–78, 1183–87.

adultery threats are variously described as being “paradigmatic,”¹¹¹ “modal,”¹¹² “quintessential,”¹¹³ and “canonical”¹¹⁴ cases of criminal blackmail.

The abiding puzzle of blackmail is the gap between what the harm principle appears to render punishable (i.e., Categories 1–4) and the additional category of what popular intuitions regard as culpable (i.e., Category 5). Commentators follow two paths to close that gap: (A) arguments by Michael Gorr, George Fletcher, and James Lindgren to the effect that, even though it is permissible to unconditionally do either of the two things *alone* that biconditional proposals in Category 5 cases conditionally propose, it is nevertheless wrongful to conditionally threaten and offer to do the same things depending upon payment; and (B) a novel and creative argument by Mitchell Berman that, by making a biconditional proposal, an actor in Category 5 provides evidence that, if it were to do what he threatens to do, it would be with a blameworthy motive and, therefore, wrongful.

As between the two paths, I think Berman’s is more revealing because the arguments surrounding Berman’s claim lie at the core of why the paradox of blackmail is so hard to resolve.

A. Biconditional Proposals as constitutive of wrongful harm

Gorr, Fletcher, and Lindgren argue that by making a biconditional proposal regarding incriminating or embarrassing information, an actor, A, commits a wrong, despite the fact that he would *not* be committing a wrong if he unconditionally did what he threatens and offers to do.

1. Michael Gorr

Gorr makes an argument that is both simple and powerful, provided his normative premises are valid. Gorr argues that by making a biconditional proposal regarding incriminating or embarrassing information, an actor necessarily *either* threatens to do what it is morally wrong to do *or* offers to do what it is morally wrong to do, though the actor may not know *ex ante* which it is. The argument is as follows:

Premise 1: It is both morally wrong and criminalizable for an actor to *threaten* to do X when it is morally wrong to *do* X.

Premise 2: It is also morally wrong and criminalizable for an actor to *offer* to refrain from X when it is morally wrongful to *refrain* from X.

¹¹¹ *Blackmail*, *supra* note 36, at 90.

¹¹² *Id.* at 73.

¹¹³ Katz, *supra* note 67, at 1580.

¹¹⁴ Christopher, *supra* note 23, at 743.

Premise 3: Disclosing incriminating or embarrassing information about another person is always either morally the right thing to do or morally the wrong thing to do, just as not-disclosing it is either the right or the wrong thing to do, though an actor may be unable to determine *ex ante* which is right and which is wrong.

Premise 4: An actor who makes a biconditional proposal regarding incriminating or embarrassing information *both* threatens to disclose the information *and* offers not to disclose it.

Premise 5: An actor who makes a biconditional proposal regarding incriminating or embarrassing information either threatens to do what it is wrong to do or offers to do what it is wrong to do, though he may be unable to determine *ex ante* which of the two alternative actions that he proposes is the wrongful one.¹¹⁵

Conclusion: It is wrong and criminalizable for an actor to make a biconditional proposal regarding incriminating or embarrassing information.

Gorr's argument presents two problems—one regarding Premise 2, the other regarding Premise 3. Contrary to Gorr's Premise 2, it is *not* normally criminalizable to offer to refrain from X when such refraining is morally wrong. The reason the offer is not normally criminalizable is that the act being offered, viz., the act of *omitting* to do X, is not normally a criminal offense. Absent a special relationship between an actor and the victim of an omission, an actor normally has no legal duty to act and, therefore, commits no legal offense by omitting to act. Consider Husband-1's relationship to his information about David Letterman's adultery. Even if we assume that Husband-1 has a moral duty either to disclose Letterman's adultery to the public or not to disclose, it does not follow that *omitting* to disclose it is a criminalizable offense. And if omitting to do so is not criminalizable, *offering* to omit is not criminalizable either. Consequently, if offering to omit disclosure is not a criminalizable offense, Gorr is wrong to state that actors like Husband-1 necessarily commit criminalizable offenses by both threatening to disclose adultery and offering to omit doing so.

The more serious problem is Gorr's assumption in Premise 3 that an actor who possesses incriminating or embarrassing information is either morally obliged to disclose it or morally obliged to keep it secret—that is, that an actor who does *not* commit a wrong by disclosing such information *does* commit a wrong by keeping it secret, and vice versa. To illustrate how problematic the assumption is, consider an ordinary commercial proposition in which an actor, A, offers to sell a parcel of land to B if B pays him \$100,000, while otherwise threatening to retain it.

¹¹⁵ Gorr, *supra* note 21, at 55–57.

Mimicking Gorr, one can truly assert that *if* A is morally obliged to either sell the parcel or retain it, then A commits a moral wrong by both offering to sell and threatening not to, depending upon whether he receives the amount he seeks. Yet, plainly, A is *not* morally obliged either to sell the property or retain it. On the contrary, the moral factors that militate for and against A's selling are sufficiently in equilibrium that A is morally permitted to do whichever he chooses. Now consider an actor like Husband-1 who possesses information regarding David Letterman's adultery. If A is permitted to sell or not sell a parcel, whichever A chooses, why is Husband-1 not similarly permitted to sell or not sell Letterman's adultery to the tabloids, whichever Husband-1 chooses? By the same token, if Husband-1 is permitted to *sell or not sell* Letterman's adultery to the tabloids, why is Husband-1 not similarly permitted to *disclose it or not disclose it*, whichever Husband-1 chooses?¹¹⁶

2. George Fletcher

As I previously mentioned, Fletcher argues that blackmail is wrongful because, in contrast to other commercial bargains which parties can enforce through the courts, blackmail relegates victims to the continuing domination of actors who can freely demand more and more money from them, knowing that, regardless of how much a victim may have already paid, he cannot sue to enforce the original contract without revealing the very information he wishes to hush up.¹¹⁷ Commentators have criticized Fletcher, arguing that if Fletcher is correct, it leads to the counterintuitive conclusion that blackmail is permissible whenever threats involve incriminating or embarrassing information that, if it is to prejudice its victim, must be disclosed immediately or abandoned as a threat.¹¹⁸ However, Fletcher's theory raises even more serious problems.

First, the instability in blackmail agreements that Fletcher says renders victims continually vulnerable also *strengthens* their bargaining position. Parties to putative blackmail agreements know the same thing that Fletcher knows: that, in practice, agreements between them are effectively unenforceable, thus freeing A to return again and again to demand more money from B. This instability reduces the value of A's promise of silence and, hence, reduces the price that A can demand for silence. A may be able to return again and again for more money, but, since it is no secret that A's promise of silence has little value, the sum he receives at any time is discounted by that very prospect.

¹¹⁶ See Altman, *supra* note 22, at 1652 ("[O]n many plausible views of moral obligation, revelation is sometimes permissible and non-mandatory. For example, many people believe that disclosing marital infidelity to a cheated spouse is sometimes permissible but not required.").

¹¹⁷ See George P. Fletcher, *Domination in Wrongdoing*, 76 B.U. L. REV. 347, 354 (1996); Fletcher, *supra* note 31, at 1626.

¹¹⁸ See, e.g., *The Evidentiary Theory*, *supra* note 42, at 825; Christopher, *supra* note 23, at 764; Henry Smith, *The Harm in Blackmail*, 92 Nw. U. L. REV. 861, 889 (1998).

Second, it is hard to see how B suffers from A's successive demands—or, at least, why B's suffering suffices to justify criminalizing A's successive demands. If B has already paid what he thinks A's silence is worth, he will refuse to pay A any more, forcing A to decide whether to go ahead and disclose the information. If A *does* disclose it, B can sue A for breach of contract and recoup the money he paid in vain, thus restoring himself to the position he would have occupied if A had disclosed the information unconditionally and depriving A of the benefits of coercion.¹¹⁹ If A does *not* disclose, he will have given B the benefit of his bargain. If B yields to A's demand for more money, it will only be because he thinks he underpaid A the first time around.

Finally, if Fletcher is right, that the prospect of victims being pressured to pay again and again for the same promise of silence is sufficiently wrongful to be criminal, it leads to a counter-intuitive conclusion: that neither the original blackmail proposal nor the agreement to which it leads is itself morally wrongful. Instead, the only wrongful thing is a *successive* biconditional proposal, if there is any. The proper response to Fletcher's theory, therefore, is not to criminalize all biconditional proposals, but to make it a crime to propose a biconditional proposal in disregard of prior payment of hush money pursuant to a *prior* agreement.¹²⁰

3. James Lindgren

Lindgren's argument is that that BPs regarding incriminating or embarrassing information are criminalizable because they constitute a form of theft: they consist of an actor's effort to exact value from another by controlling information that properly belongs exclusively to others, whether the others are persons whose privacy would be violated by disclosure or persons whose interests in information would be violated by non-disclosure. Thus, when an actor, A, threatens to disclose private information about B unless he is paid, A seeks money by controlling the disclosure of information, the disclosure and non-disclosure of which properly belongs to B. And when an actor, A, offers in return for money *not* to disclose incriminating evidence about B to the authorities, A seeks money by controlling the disclosure of information, the disclosure of which belongs to the public.¹²¹

The problem with Lindgren's theory is (i) in so far as Lindgren is correct about BPs in Categories 1, 3, and 4, it is because his account is derivative of the criminalizability of unconditional acts in these categories for the reasons we have

¹¹⁹ Although bargained-for promises to withhold *incriminating* information are not enforceable, bargained-for promises to withhold Category 5 information are legally enforceable.

¹²⁰ See Altman, *supra* note 22. Fletcher responds by arguing that criminalizing the first demand is justified in order to protect persons who live in fear of a second demand as soon as they make the first payment. Fletcher, *supra* note 31, at 1637–38. (“[T]he relationship of dominance and subordination comes into being as a result of the victim's making the first payment The dominance consists in the knowledge that the victim is now fair game for repeated demands.”). For criticism of Fletcher's response, see Yehudai, *supra* note 4, at 791–92.

¹²¹ Lindgren, *supra* note 27, at 1705–06; Lindgren, *supra* note 34, at 672.

previously discussed; (ii) although Lindgren is correct about Category 2, his account is superfluous; and (iii) in so far as the issue is Category 5, Lindgren fails to explain why BPs in Category 5 should be criminalized.

i. Lindgren's account regarding Categories 1, 3, and 4 is derivative.

We have previously seen that it is both morally wrong and criminalizable for an actor to *threaten* disclosures in Categories 1, 3, and 4 because the *disclosures* themselves are wrongful. Given that such threats are criminalizable, it is also true, as Lindgren argues, that it is criminalizable for an actor to condition such threats and offers on payments of money. However, the wrongfulness that Lindgren highlights in Categories 1, 3, and 4—that is, the wrongfulness of seeking and obtaining money—is derivative of the wrongfulness of the respective disclosures and non-disclosures to which the demands for money are tied.

ii. Lindgren's account regarding Category 2 is superfluous.

Lindgren succeeds well in providing a non-derivative account of Category 2, i.e., crime-exposure blackmail. Lindgren can show that, even if it is not morally wrong and criminalizable for A to fail to tell the authorities that B has committed a crime, it is morally wrong and criminalizable for A to demand compensation from B for not telling the authorities. For by demanding compensation for withholding evidence, A becomes complicit in B's obstruction of justice: the payment of money increases the likelihood that A will remain silent where he would otherwise assist the authorities in prosecuting B.¹²² Nevertheless, while Lindgren's account is sound, it is also superfluous. For, as we saw in Part IV.B, Berman provides an alternative and independent account of why crime-exposure blackmail is criminalizable.¹²³

iii. Lindgren fails to account for Category 5.

Significantly, Lindgren does nothing to resolve the one category of biconditional proposals that is truly paradoxical, namely, Category 5. As we have seen, Category 5 consists of biconditional proposals regarding information that an actor cannot be blamed for disclosing, because the information falls into one of three subsets: (1) the public's interest in disclosure is morally superior to the individual's interest in privacy; (2) the two sets of interests are in moral equilibrium; or (3) the balance between disclosure and privacy remains morally indeterminate. Let us consider the three subsets.

¹²² See Lindgren, *supra* note 27, at 1701.

¹²³ See *supra* Part IV.B.

Interests in privacy and disclosure are in equilibrium. If competing interests in privacy and disclosure are in moral equilibrium, no one can rightly complain if an actor discloses information or refrains from disclosing it. And if no one can complain about an actor's disclosing or not disclosing information, then contrary to Lindgren, an actor who demands money for not disclosing the information does not exact value from another by controlling information, the rightful control of which belongs to others.

Interests in privacy and disclosure are indeterminate. If an actor cannot determine *ex ante* the moral balance of interests regarding information—that is, if he cannot determine whether moral interests favor disclosure, whether they favor non-disclosure, or whether they remain in equilibrium—he cannot be blamed, regardless of whether he discloses the information or refrains from disclosing it. And if an actor, A, cannot be blamed regardless of whether he discloses information or refrains from disclosing it, he cannot be blamed for having exacted value properly belonging to others in the event he requests and receives money from B in return for not disclosing the information.

Interests favor disclosure. If an actor, B, is morally obliged to disclose information, his target, A, cannot rightly complain about A's threatening to disclose the information. And by demanding money from B in return for silence, A is not exacting value to which B is morally entitled. To be sure, if A is morally obliged to disclose the information, then *someone* exists—whether the public at large or C—who has a moral claim to the information. In that event, A commits the moral wrong of deriving value from omitting to disclose information the disclosure of which rightly belongs to others. However, as we have seen in connection with Gorr, a *moral* wrong of omission is not a *criminalizable* wrong of omission. An actor may morally wrong the public by not disclosing information; and, hence, he may wrong the public by offering not to disclose information or offering not to do so in return for money. But absent a duty, he does not commit a criminal wrong by doing so.

B. Berman: Biconditional Proposals as evidence of the wrongful harm

Mitchell Berman has addressed blackmail on three separate occasions: twice, in 1998 and 2006, in support of a motive-based theory of blackmail;¹²⁴ and once, in 2011, in support of a belief-based theory, which he proposes as an alternative

¹²⁴ *Meta-Blackmail*, *supra* note 44; *The Evidentiary Theory*, *supra* note 42.

while continuing to embrace his earlier, motive-based approach.¹²⁵ I shall focus on Berman's motive-based theory because I think that its strengths and weaknesses help explain why the paradox of blackmail is so difficult to resolve.

Berman's evidentiary theory is sometimes mistakenly grouped with those of Gorr, Fletcher and Lindgren because, like them, Berman believes that the act of making a biconditional proposal is relevant to the criminality of an actor's conduct.¹²⁶ In reality, however, Berman belongs with Feinberg because, like Feinberg, Berman believes that the criminality of biconditional proposals is derivative of the criminality of disclosures and non-disclosures that actors respectively threaten and offer, were they to make the disclosures or non-disclosures unconditionally. The act of making a biconditional proposal is relevant, Berman says, but its relevance is purely *evidentiary*: by making a biconditional proposal, an actor provides evidence of an actor's blameworthy motivation regarding the acts of disclosure and non-disclosure he conditionally proposes, and his blameworthy motive operates, in turn, to transform what would otherwise be permissible disclosures and non-disclosures into criminal ones.¹²⁷

Berman's view of blackmail is embedded in a distinctive theory of criminal responsibility. I will describe his theory of criminal responsibility and the view of blackmail that emerges from it and then discuss what I regard as its strengths and weaknesses.

1. Berman's Theory of Criminal Responsibility

To highlight Berman's distinctive view of criminal responsibility, I will start with a conventional view of criminal responsibility and then describe Berman's departures from it.

Conventional views of criminal responsibility proceed, whether explicitly or implicitly, from an anterior concept of wrongdoing. An actor engages in "wrongdoing" if (1) he brings about what the criminal law regards as a *prima facie* harm or evil; and (2) the harm or evil is *not* one that the criminal law regards as a lesser evil under the circumstances. Thus, an actor does not commit a wrong under Component 1 by *killing a fly* (to use George Fletcher's example), because the criminal law does not regard the killing of flies as a harm or evil of any kind.¹²⁸ Similarly, an actor who brings about such a harm or evil (say, killing a human being) does not commit a wrong under Component 2 if the criminal law regards

¹²⁵ See *Blackmail*, *supra* note 36. For a critique of Berman's 2011 essay, see Peter Westen, *A Critique of Mitchell Berman's Belief-Based Theory of Blackmail*, on file with the Ohio State Journal of Criminal Law, available at <http://moritzlaw.osu.edu/students/groups/osjcl/>.

¹²⁶ See, e.g., Christopher, *supra* note 23 at 764–68 (mistakenly grouping Berman with Lindgren and Fletcher).

¹²⁷ See *Meta-Blackmail*, *supra* note 44, at 788–91; *The Evidentiary Theory*, *supra* note 42, at 847–49.

¹²⁸ See George P. Fletcher, *The Nature of Justification*, in *ACTION & VALUE IN CRIMINAL LAW* 175, 183 (Stephen Shute et al. eds., 1993).

the harm or evil as a lesser evil under the circumstances (say, killing of a human being to stop him from imminently and wrongly killing an innocent person). An actor only commits a wrong if he satisfies both Components 1 and 2 (say, by killing a child who is not a threat to anyone). This does not mean that wrongdoing is sufficient for criminal responsibility, or even necessary for criminal responsibility. It is not. Nevertheless, the concept of wrongdoing is useful because it is something to which conventional views of criminal responsibility make reference.

With this concept of wrongdoing in mind, we can turn to conventional views of criminal responsibility. Conventionally, and putting complicity aside, an actor can be criminally responsible either *for* wrongdoing or *without* wrongdoing:

Responsibility *for* wrongdoing. An actor who engages in wrongdoing is criminally responsible for it, if (1) he has a culpable state of mind (e.g., purpose, knowledge, recklessness, or negligence) regarding his causing the harm or evil; and (2) he does not reasonably believe that the harm or evil is a lesser evil under the circumstances.

Responsibility *without* wrongdoing. An actor who does not engage in wrongdoing is also criminally responsible if he (1) threatens or attempts to commit a wrong or creates a substantial and unjustified risk of a wrong; (2) he does so with a culpable state of mind, e.g., purpose, knowledge, recklessness or negligence, regarding the act of threatening, attempting, or risk-creation; and (3) in the case of threats and attempts, (a) he does so with a culpable state of mind regarding the harm or evil and (b) he does not reasonably believe that the harm or evil is a lesser evil under the circumstances.

As between these two grounds of criminal responsibility, we can disregard the first ground ("Responsibility *for* wrongdoing") for purposes of Category 5, because an actor who engages in Category 5 blackmail does not commit a wrong. His disclosure or non-disclosure may inflict harm. But by definition, the harm is not the greater evil under the circumstances and, even if it is, there is no basis for thinking the actor that does not reasonably believe it to be a lesser evil. For purposes of Category 5, therefore, the relevant ground of responsibility, if any, is the second ("Responsibility *without* wrongdoing").

Berman departs from the foregoing view in a significant respect. Although Berman believes that the second ground of responsibility *suffices* to inculcate a person without wrongdoing, he does not believe that it is *necessary*. Instead, Berman argues that a person who inflicts a harm or evil that *is* a lesser evil under the circumstances and that he reasonably *believes* to be a lesser evil is nevertheless criminally responsible if his motive in inflicting the harm or evil is not to achieve a lesser evil. This is a departure from the conventional view that, regardless of a

person's motive in inflicting a lesser evil, he is not criminally responsible if he reasonably believes it to be a lesser evil.

To illustrate the departure, consider an actor, A, who sees that a wrongful aggressor, V, is going to kill an innocent, B. A rightly believes that the only way that he can stop V from imminently killing B is to shoot V in the leg, which he promptly does. Yet A's real reason for shooting V—that is, the motive without which A would not have shot V—is to wreak vengeance upon V for having insulted A years earlier, not to stop V from killing B (for whom A has no regard whatsoever). Now as we have seen, if A is criminally responsible at all, he is responsible without wrongdoing, because he did not inflict a harm that is a greater evil under the circumstances. And, conventionally, he would not be responsible given that he reasonably believed himself to be committing a lesser evil. Yet Berman argues that the absence of a good motive by A for inflicting the harm transforms A's act from being a non-culpable defense of B to being a blameworthy assault of V.¹²⁹

To be sure, Berman's discussion in this context is ambiguous. He states that an actor, A, is blameworthy if he knowingly causes or threatens harm to others, unless (i) A actually believes that his action will produce more good than evil; and (ii) the latter belief is a "*but-for cause of his action*."¹³⁰ The reference to belief as "but-for cause" can mean one of two things:

(1) An actor's belief that a harm is a lesser evil under the circumstances is a but-for cause of his inflicting the harm if it was a *necessary condition* of his inflicting the harm.

(2) An actor's belief that a harm is a lesser evil under the circumstances is a but-for cause of his inflicting the harm if it was his *motivating reason* for inflicting the harm.

To illustrate the difference between 1 and 2, consider an actor, A, who discloses to B's spouse that B is guilty of adultery. A would not do so unless he thought he was "doing the right thing"—that is, unless he believed that disclosing B's adultery was a lesser evil to keeping it secret from B's spouse. Yet A's motivating reason in making the disclosure is not to help B's spouse (whom he actively dislikes) but to hurt B. According to 1, A is *not* blameworthy, because inflicting a lesser evil is a condition of his action. According to 2, however, A *is* blameworthy, because inflicting a lesser evil is not his aim. Although Berman's reference to "but-for cause" is ambiguous as between 1 and 2, he later makes clear in his discussion of adultery that he interprets "but-for cause" in accord with 2.¹³¹

¹²⁹ *The Evidentiary Theory*, *supra* note 42, at 854.

¹³⁰ *Id.* at 839–40.

¹³¹ *See id.* at 845–46; *Meta-Blackmail*, *supra* note 44 at 791–95.

Berman's claim, though unconventional, shares something in common with the much-mooted Catholic "doctrine of double effect" [DDE] regarding wrongdoing. DDE originates in an elliptical statement by St. Thomas Aquinas¹³² that has produced two strands that are easily conflated:¹³³ (1) the *causal* strand, according to which the wrongfulness of inflicting a harm that is otherwise justified by a greater good can depend upon whether the harm can be a *causal side effect* of achieving the good, or whether it can in fact only be a *causal means* for achieving the good;¹³⁴ and (2) an *intentionalist* strand, according to which the wrongfulness of inflicting a harm that is otherwise justified as a side effect of a greater good can depend upon whether the actor, being aware of the justificatory grounds, merely foresees the harm or whether he subjectively aims at the harm as either an end of his own or a means toward it.¹³⁵ The intentionalist strand is typically illustrated by a hypothetical involving wartime bombing. Assume, for example, that a pilot for a country that is engaged in a just war bombs an enemy munitions factory at the price of killing one hundred innocent enemy children. According to the intentionalist strand, a bombing that is permissible to achieve the greater good of ending the war if the pilot merely foresees the death of the children in the aftermath of the munitions explosion may become wrongful if the pilot executes the very same mission from a desire to watch the children die in the aftermath of the explosion.

Berman's view shares a basic principle in common with the intentionalist strand of DDE: they both take the position that the motive with which a person inflicts a lesser evil, for which he would otherwise be blameless, can render him blameworthy and, hence, criminally responsible. The difference between the two is that the intentional strand of DDE claims that the actor's motive can transform conduct that would otherwise be *non-wrongdoing* into *wrongdoing*, while Berman

¹³² See T.A. CAVANAUGH, DOUBLE EFFECT REASONING 1–14 (2006).

¹³³ See David Enoch, *Intending, Foreseeing, and the State*, 13 LEGAL THEORY 69, at 71–73 (2007) (contrasting the causal strand with the intentionalist strand); Neil Francis Delaney, *Two Cheers for "Closeness": Terror, Targeting and Double Effect*, 137 PHIL. STUDIES 335, 355–59 (2008) (distinguishing between the two strands).

¹³⁴ See, e.g., William J. FitzPatrick, *Acts, Intentions, and Moral Permissibility: In Defence of the Doctrine of Double Effect*, 63 ANALYSIS 317, 319 (2003) (claiming that DDE truly consists solely of the causal strand); Alison McIntyre, *Doing Away With Double Effect*, 111 ETHICS 219, 22 (2001) (same). For an analysis of the difference between intending and foreseeing civilian casualties, see William J. FitzPatrick, *The Intend/Foresee Distinction and the Problem of "Closeness"*, 128 PHIL. STUDIES 585, 588–92 (2006). The killing of 100 children in an explosion's aftermath that is justified as a side effect of the greater good of ending a war does not qualify under the causal strand simply because the bombardier personally undertakes the mission in order to end the war by evoking terror from the children's death, because the deaths, being capable of constituting a side effect of winning the war, do *not* solely constitute a means for ending the war.

¹³⁵ See, e.g., Judith Jarvis Thomson, *Physician-Assisted Suicide: Two Moral Arguments*, 109 ETHICS 497, 515–16 (1999) (taking DDE to consist of the intentionalist strand); Alex Walen, *The Doctrine of Illicit Intentions*, 34 PHIL. & PUB. AFF. 41, 43 (2006) (same).

claims that an actor's motive transforms *blameless* non-wrongdoing into *blameworthy* non-wrongdoing.

2. Berman's View of Blackmail

Berman both agrees with Feinberg in one respect and disagrees in others. Berman agrees with Feinberg that an actor's criminal responsibility for making a BP is derivative of the criminal responsibility the actor would possess were he unconditionally to do what he conditionally offers and threatens to do. Yet Berman disagrees with Feinberg in two respects. First, as we have seen, Berman believes that the motives with which an actor performs an otherwise blameless unconditional act (e.g., A's shooting V in defense of B) can render the actor blameworthy. Second, Berman believes that the fact that an actor, A, makes a BP regarding X provides evidence that would not otherwise exist that, were he to unconditionally *do* X or *refrain* from doing X, he would be blameworthy. As a result, Berman finds criminal responsibility in Category 5 cases where Feinberg would not, as illustrated by the hypothetical involving Mr. Littleman:

Littleman. Husband-2, who lives in a jurisdiction in which adultery is no longer a crime, learns that his wife had an affair with their neighbor, Mr. Littleman, whose wife, Mrs. Littleman, has previously said she would want to know if her husband were unfaithful. Husband-2 threatens to tell Mrs. Littleman about her husband's affair unless Mr. Littleman pays him \$10,000, to hush it up.

Feinberg would decriminalize proposals like Husband-2's, on the ground that the threatened disclosures, if made unconditionally, are not morally wrongful harms given the legitimate interest of wives like Mrs. Littleman in knowing about their spouses' infidelity. In contrast, Berman would criminalize Husband-2's proposal,¹³⁶ on the ground that the proposal is evidence that, if Husband-2 were he to make the disclosures unconditionally, it would not be because Husband-2 cared about Mrs. Littleman. For if Husband-2 really cared about Mrs. Littleman, he would not make a biconditional proposal offering silence. The evidence is not conclusive, to be sure. However, the evidence is sufficient, Berman argues, to raise the question whether Husband-2's motivation renders his proposed conduct wrongful.¹³⁷ In sum, Berman argues that the making of biconditional proposals in Category 5 cases provides evidence of motivation regarding the disclosure being threatened; that the motivation would render the disclosure blameworthy; and that

¹³⁶ See *The Evidentiary Theory*, *supra* note 42, at 821; *Blackmail*, *supra* note 36, at 90.

¹³⁷ See *The Evidentiary Theory*, *supra* note 42, at 845-46.

because the disclosure itself would be blameworthy, the threat to make it is also blameworthy.¹³⁸

3. The Advantages of Berman's View

Berman's evidentiary theory of blackmail has two notable strengths. First, as we saw in Part IV.B, Berman shows that one problematic category of blackmail, i.e., crime-exposure blackmail, is consistent with the harm principle and, hence, non-paradoxical. And he does so without having to rely on contestable claims regarding the role of motivation in criminal responsibility. Second, and perhaps more importantly, Berman's theory appears to be the account that best coheres with popular intuitions regarding Category 5 blackmail.

Paul Robinson and two colleagues recently conducted an empirical study of popular intuitions regarding blackmail.¹³⁹ They started with five scholarly theories of blackmail, including Feinberg's and Berman's, all of which lead to different results regarding which biconditional proposals should be criminalized as blackmail and which should not. The authors then formulated a questionnaire designed to determine which theory was most consistent with popular intuitions. They determined that Berman's motivational theory scored higher than other theories. In particular, they found that participants strongly agreed with Berman that adultery BPs should be punished and, hence, strongly disagreed with Feinberg that they should not.

Berman's theory also appears to explain the Model Penal Code's most distinctive contribution to the law of extortion and blackmail. MPC § 223.4 makes it a crime, "theft by extortion," to obtain property of another by means of any of seven kinds of "threats." The list begins with the types of threats that every jurisdiction regards as criminal extortion or blackmail, including threats to:

- (1) inflict bodily injury on anyone or commit any other criminal offense;
- (2) accuse anyone of a crime; and
- (3) expose any secret tending to subject any person to hatred, contempt or ridicule

The list concludes, however, with a seventh and residual category of threats that one commentator refers to as the "central case of blackmail."¹⁴⁰ Specifically,

¹³⁸ For commentators who share Berman's view that an actor's bad motives can render otherwise legitimate disclosures wrongful, see HARMLESS WRONGDOING, *supra* note 16, at 276; Gordon, *supra* note 22, at 1766–69; Katz, *supra* note 67, at 1598, 1602; Lamond, *supra* note 15, at 228; Stephen E. Sachs, *Saving Toby: Extortion, Blackmail, and the Right To Destroy*, 24 YALE L. & POL'Y REV. 251, 260–61 (2006). Cf. Linda Ross Meyers, *Unruly Rights*, 22 CARDOZO L. REV. 1, 35–39 (2000) (arguing that the malicious motives with which a person discloses information that the public has a legitimate interest in can and should render an otherwise justifiable disclosure tortious).

¹³⁹ See Robinson et al., *supra* note 6, at 291.

¹⁴⁰ John Mercer, *Cybersquatting: Blackmail on the Information Superhighway*, 6 B.U. J. SCI. &

§ 223.4(7) makes it an offense to obtain property of another by threatening to "inflict *any other harm* which would *not benefit the actor*." In doing so, § 223.4(7) prohibits what commentators call "non-informational blackmail." I have thus far used "blackmail," as it is traditionally used, to refer to threats to disclose and offers to withhold incriminating or embarrassing *information*. Many commentators argue, however, that the same principles of justice that make it appropriate to criminalize informational blackmail also make it appropriate to extend the prohibition to include some instances in which A obtains property of B by threatening actions *other than disclosure* that, if performed unconditionally, are lawful.¹⁴¹ Section 223.4(7) does precisely that. It treats informational blackmail as a subset of a larger set of generic conduct in which A obtains property of B by threatening to inflict a "harm" that would "not benefit" A, including harms that, if inflicted unconditionally, would be entirely lawful.

To illustrate, consider two hypothetical threats that Leo Katz devises to probe non-informational blackmail, ones that Berman and Katz both regard as culpable:

Religious defector: A, who has nothing against Catholicism, nevertheless knows that his father, B, would die if A left the Church. Accordingly, A puts a biconditional proposal to B: "I will leave the Catholic Church, unless you pay me \$10,000, in which case I will refrain from doing so." B pays the money.

Military service: A, who has no love of the military, knows that B, a devoted father, fears that B's son will die in a foreign war. Accordingly, A puts a biconditional proposal to B: "I will use my considerable powers of persuasion to persuade your son to enlist in the army, unless you pay me \$10,000, in which case I will refrain from doing so." B pays the money.¹⁴²

Interpreted literally, § 223.4(7) criminalizes A's conduct in both "Religious defector" and "Military service," because A obtains money from B in both cases by threatening to inflict a harm that does not benefit A yet harms B. More

TECH. L. 290, 310 n.121 (2000).

¹⁴¹ See Peter Alldridge, 'Attempted Murder of the Soul': *Blackmail, Privacy and Secrets*, 13 OXFORD J. LEG. STUD. 368, 370-71 (1993); *The Evidentiary Theory*, *supra* note 42, at 806-07, 852-53, 866-67; Walter Block, *Blackmail Is Private Justice—A Reply to Brown*, 34 U. BRIT. COLUM. L. REV. 11, 13 (2000); Christopher, *supra* note 23, at 743-44; FEINBERG, *supra* note 16, at 258-59; Fletcher, *supra* note 31; Gorr, *supra* note 21, at 59; Isenberg, *supra* note 22, at 1920-23; Katz, *supra* note 67, at 1567-68, 1569-73, 1578, 1581, 1602; Lamond, *supra* note 15, at 216; James Lindgren, *More Blackmail Ink: A Critique of Blackmail, Inc., Epstein's Theory of Blackmail*, 16 CONN. L. REV. 909, 923 (1984); Eric Mack, *In Defense of Blackmail*, 41 PHIL. STUD. 273, 274 (1982); Scalise, *supra* note 22, at 1484-85, 1506-07, 1510-11; Saul Smilansky, *May We Stop Worrying About Blackmail?*, 55 ANALYSIS 116, 118 (1995); Smith, *supra* note 118, at 864.

¹⁴² See Katz, *supra* note 67, at 1567-68; *The Evidentiary Theory*, *supra* note 42, at 867-68.

significantly, § 223.4(7) appears to do so by incorporating Berman's motivational view of criminal responsibility, including Berman's view that the motive with which a person acts can transform otherwise blameless conduct into blameworthy conduct. Section 223.4(7) does so because it makes it a crime to obtain property of another by threatening to inflict harms, including harms that are lawful when inflicted unconditionally, when the threat reveals that, were the actor actually to inflict the harm, he would be motivated not by any benefits that he might gain (there being none) but by the harm itself.

4. The Disadvantages of Berman's View

Berman's 1998 evidentiary theory raises two questions, both regarding the role of motivation: (i) Are biconditional proposals, indeed, evidence of blameworthy motivation? (ii) If so, does motivation regarding what one reasonably believes to be a lesser evil make one culpable for inflicting it?

i. Are biconditional proposals Evidence of Blameworthy Motivation?

Berman may be right that by making biconditional proposals regarding adultery, actors provide some evidence that, were they to make the disclosures they threaten, it would not be to achieve a greater good.¹⁴³ However, the evidence is weaker than Berman suggests because actors who make such threats are often bluffing. They threaten to disclose embarrassing information but, in fact, have no intention of carrying out their threats. Actors who are bluffing possess no motivation at all regarding any disclosures they threaten because they do not contemplate ever making such disclosures.

To be sure, Berman is aware of the problem that bluffing presents. And he attempts to address it by arguing that, just as an armed robber is guilty of robbery even though his threat to shoot is a bluff, an actor is guilty of blackmail whose threat to disclose is a bluff.¹⁴⁴ However, the two cases are not analogous. The reason bluffing does not negate the *offense* of armed robbery is that bluffing does not negate the *harm* that armed robbery inflicts upon its victim, i.e., causing a person to surrender property by subjecting him to *fear*. In contrast, bluffing does negate Berman's paradigmatic offense of blackmail because, by virtue of negating an actor having *any* motivation at all with respect to possible disclosure, it precludes him from possessing *blameworthy* motivation with respect to possible disclosure.

¹⁴³ Cf. Altman, *supra* note 22, at 1640 ("[M]any blackmailers would not have revealed the victim's secret had they lacked an opportunity to demand payment. Most blackmail differs in this regard from typical business transactions.").

¹⁴⁴ *Blackmail*, *supra* note 36, at 68.

ii. Does motivation regarding a lesser evil make its infliction blameworthy?

The more profound problem is that Berman's motivational theory is vulnerable to criticisms that plague the doctrine of double effect. The DDE has suffered near-unanimous rejection by moral philosophers and criminal-law scholars over the past two decades.¹⁴⁵ A person who inflicts a harm that he reasonably believes is a lesser evil (and, hence, a good or permissible thing under the circumstances) but who does so for the purpose of causing harm rather than enhancing the greater good may, indeed, be a bad *person* and may rightly be criticized for his motivation. But he should not be punished unless he deserves punishment, and he does not deserve punishment unless he commits a bad *act*. A good or permissible act does not cease to be good or permissible because of the motives of an actor who brings it about in full awareness of its desirability or permissibility.

Berman's problem is derivative of DDE's problem. If an actor's motive in committing what he reasonably believes to be a lesser evil cannot transform permissible conduct into wrongdoing, it cannot transform otherwise blameless conduct into blameworthy conduct. The blame an actor deserves is a function of intending, hoping, knowing, believing, or recklessly or negligently risking that he will commit a *wrong*. If what a person with *good* motives intends, hopes, knows, believes, or risks is non-wrongful, changing his motives does not make it wrongful. By the same token, if a person with good motives is blameless for what he intends, hopes, knows, believes, or risks, changing his motives does not make him blameworthy for intending, hoping, knowing, believing, or risking the same thing.

This finds support in the way prosecutors and judges have interpreted § 223.4(7) since its enactment. Section 223.4(7) has been enacted either verbatim¹⁴⁶ or in substantially identical form¹⁴⁷ by at least eighteen states. Despite

¹⁴⁵ See, e.g., LARRY ALEXANDER & KIMBERLY K. FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 96–98 (2009); SHELLY KAGAN, THE LIMITS OF MORALITY 175–77 (1989); FRANCIS M. KAMM, INTRICATE ETHICS 135 (2007); David Enoch, *Ends, Means, Side Effects, and Beyond: A Comment on the Justification of the Use of Force*, 7 THEORETICAL INQUIRIES L. 43, 46–47, 50–51 (2006); David McCarthy, *Intending Harm, Foreseeing Harm, and Failures of the Will*, 36 NOUS 622 (2002); James Rachels, *More Impertinent Distinctions and a Defense of Active Euthanasia*, in KILLING AND LETTING DIE 139, 141–42 (Bonnie Steinbock & Alastair Norcross eds., 2d ed. 1994); T.M. SCANLON, MORAL DIMENSIONS 19–36, 56–62, 66–68 (2008); Judith Jarvis Thomson, *Self-Defense*, 1991 PHIL. & PUB. AFF. 283, 292–96 (1991); but see Jeff McMahan, *Intention, Permissibility, Terrorism, and War*, 23 ETHICS 345 (2009).

¹⁴⁶ See ALASKA STAT. § 11.41.520 (2011); CONN. GEN. STAT. § 53a-119 (2011); MO. REV. STAT. § 570.010 (2011); N.J. STAT. ANN. § 2C:20-5 (2011); OR. REV. STAT. § 164.075 (2009); 18 PA. CONS. STAT. § 3923 (2011); S.D. CODIFIED LAWS § 22-30A-4 (2010).

¹⁴⁷ See ALA. CODE § 13A-8-1 (2011); ARK. CODE ANN. § 5-36-101 (2010); HAW. REV. STAT. § 707-764 (2010); IDAHO CODE ANN. § 18-2403 (West 2011); ME. REV. STAT. ANN. tit. 17-A, § 355 (2011); N.H. REV. STAT. ANN. 637:5 (2010); N.J. STAT. ANN. § 2C:13-5 (West 2011); N.Y. PENAL

its widespread enactment, it appears to have produced only four appellate court rulings, three of which upheld liability and the fourth of which rejected liability. The cases come from different jurisdictions, but the same factor explains them all: liability attaches when, and only when, an actor threatens to perform an act that is unlawful when performed unconditionally. This suggests that prosecutors and judges do not believe that a bad motive, with which a person knowingly performs an otherwise blameless act, can render his conduct blameworthy.

Thus, contrast *State v. Hynes*¹⁴⁸ with *Reese v. Tom Hesser Chevrolet-BMW*.¹⁴⁹ The defendant in *Hynes* was a lawyer who, although he introduced himself as being as a lawyer, was not acting on behalf of any client when he wrote a “cease and desist” letter to a hair salon in Concord. Although he neither used nor intended to use the services of the salon himself, he demanded that the salon cease charging more for women’s haircuts than for men’s, and more for adult haircuts than for children’s. He offered to refrain from bringing litigation if the salon paid him \$1000 but threatened otherwise to sue, claiming that \$1000 was “the minimum that would be awarded for an unfair trade practice under state law”:

I demand payment in the amount of \$1000 in order to avoid litigation I believe \$1000 is a fair amount as it is the minimum that would be awarded for an unfair trade practice alone. You have ten (10) days to comply. . . . Should you fail to comply additional steps will be taken including filing with the State Commission for Human Rights and potential removal to Superior Court. If such action is necessary I will seek all remedies available including but not limited to an injunction, damages for discrimination, damages for the unfair trade practice, ill-gotten gains, punitive damages, attorney fees and costs. If you object or otherwise wish to discuss the above matter you may have your attorney contact me.¹⁵⁰

The defendant was convicted of extortion under New Hampshire’s version of § 223.4(7), which makes it a crime to do any “act which would not in itself substantially benefit him but which would harm substantially any other person.”¹⁵¹ The defendant argued that the latter statute was unconstitutionally overbroad for failing to narrow the potential range of prohibited harms. The New Hampshire Supreme Court affirmed his conviction, ruling that the term “harms” is confined to acts and demands that are themselves “unlawful” or “wrongful.”¹⁵² The threatened

§ 135.60, (McKinney 2011); N.D. CENT. CODE § 12.1-23-10 (2011); UTAH CODE ANN. § 76-6-406 (West 2011); WASH. REV. CODE § 9A.04.110 (2011).

¹⁴⁸ *State v. Hynes*, 978 A.2d 264 (N.H. 2009).

¹⁴⁹ *Reese v. Tom Hesser Chevrolet-BMW*, 604 A.2d 1072 (Pa. Super. Ct. 1992).

¹⁵⁰ *Hynes*, 978 A.2d at 268.

¹⁵¹ N.H. REV. STAT. ANN. § 637:5, II(i) (2010).

¹⁵² *Hynes*, 978 A.2d at 278.

lawsuit coupled with the demand for \$1000 were wrongful, the court said, because the defendant lacked "a good faith basis to believe that [the suit] had merit,"¹⁵³ for the following reasons: the defendant neither represented anyone who used the salon nor used the salon himself, and, therefore, he was not an "injured" person with standing to sue for \$1000 under the state's unfair-trade-practices; for the same reasons, the defendant was not an "injured" person with standing to sue under the state's non-discrimination statute; even if the defendant had standing under the latter statute, he was barred by the statute from suing for punitive damages; and even if he possessed standing to sue for a penalty under the latter statute, the penalty would have been payable only to the state, not to a private person such as himself. In short, the defendant threatened "to bring an action which . . . as an attorney [he] knew he could not [successfully] pursue," seeking "a cash payment to which he was not legally entitled."¹⁵⁴

In contrast, the court in *Reese* found no violation of Pennsylvania's version of § 223.4(7) because the harm the defendant threatened to inflict was ruled not to be wrongful.¹⁵⁵ Reese, who was employed at-will as a used car salesman, provided incorrect information to a bank that extended used-car loans to purchasers, resulting in a loss of \$1200 to his employer. His employer threatened to fire Reese unless Reese and three other employees involved each contributed \$300 to cover the employer's loss, an amount equaling twice Reese's commission on the sale. Reese refused and was fired. Reese sued, arguing that his employer unlawfully fired him for refusing to comply with a criminal threat (the criminal threat being the employer's threat); unless Reese paid him, the employer would inflict a harm on Reese that did not benefit the employer (i.e., the harm of discharge). The court dismissed the claim, ruling in part that the threat did not violate § 223.4(7), because the threatened act—namely, the act of conditioning an employee at-will's continued employment on reimbursement of money the employee's misconduct caused the employer to lose—was not itself unlawful.¹⁵⁶

Hynes and *Reese* are implicitly consistent with illustrations in Commentary to the Model Penal Code. The Commentary gives three illustrations of conduct that violates § 223.4(7).¹⁵⁷ Significantly, all three illustrations involve threats to do something that, if done unconditionally, would be wrongful. Thus, one involves an actor who demands money for a good that ought not to be commodified, under the threat of otherwise not providing it, e.g., an academic grade.¹⁵⁸ The other two involve actors who engage in self-dealing by threatening to commit acts that, if committed, would violate duties of fidelity to their employers.¹⁵⁹ All three involve

¹⁵³ *Id.* at 272–73.

¹⁵⁴ *Id.* at 274 (internal quotation marks omitted).

¹⁵⁵ *Reese v. Tom Hesser Chevrolet-BMW*, 604 A.2d 1072, 1074–75 (Pa. Super. Ct. 1992).

¹⁵⁶ *Id.*

¹⁵⁷ MODEL PENAL CODE & COMMENTARIES § 223.4 (1980).

¹⁵⁸ *Id.* at 223.

¹⁵⁹ *Id.*

acts that, if committed, would constitute central violations of what the federal fraud statute refers to as deprivations of “honest services,” namely, kickbacks and bribes on the part of persons who owe duties to others.¹⁶⁰

Stephen Sachs argues, nonetheless, that § 223.4(7) has moral validity in at least one category of cases, namely, destruction-of-property cases that are poignantly illustrated by the internet scheme in which the owner of a pet bunny, “Toby,” threatened to kill Toby unless internet users sent him a total of \$50,000 by a date certain.¹⁶¹ These cases consist, he says, of ones in which an actor, A, endeavors to obtain property of B by threatening otherwise to destroy A’s own property where (i) A does not benefit from destroying his own property, and (ii) A’s motive regarding such destruction is to spite B for not complying with the threat.¹⁶² If Sachs’s theses were correct, however, it would produce an anomaly, which is best illustrated by the rights of property owners to erect so-called “spite fences.” Property owners are permitted to erect fences that are unsightly and obnoxious to their neighbors, regardless of the owners’ motives, provided they rightly believe that building codes justify it.¹⁶³ Property owners are also permitted

¹⁶⁰ The U.S. Supreme Court has narrowed the definition of “honest services” under the federal mail fraud statute but interpreted to prohibit bribery and kickbacks of the kind the Model Penal Code hypothesizes. See *Skilling v. United States*, 130 S. Ct. 2896, 2932 (2010).

¹⁶¹ See Sachs, *supra* note 137, at 251–53.

¹⁶² *Id.* at 256–61.

¹⁶³ There was no prohibition against “spite” fences at common law. See *Rideout v. Knox*, 19 N.E. 390 (Mass. 1889) (opinion by Holmes, J.) (“At common law, a man has a right to build a fence on his own land as high as he pleases, however much it may obstruct his neighbor’s light and air.”). Around the beginning of the 19th century, however, a number of jurisdictions began regulating spite fences in various ways: (1) by allowing fences within certain height limits and prohibiting fences in excess of the limits; (2) by allowing fences within certain height limits and permitting fences in excess of the limits with consent of neighbors; and/or (3) subjecting fence-building to the law governing private nuisance, where structures and activities on private land are lawful unless their reasonable utility to landowners is outweighed by the gravity of harm to neighbors. See Stewart Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 62 (1987); Deborah Tussey, Annotation, *Fence as Nuisance*, 80 A.L.R. 3d 962 (1977).

For purposes of (1) and (2), a property-owner’s spiteful motives in building a fence is irrelevant, provided the owner builds the fence within lawful limits. For purposes of (3), an owner’s motives may be relevant evidence regarding whether a fence has reasonable utility. But once a fence is determined to have reasonable utility that outweighs harm to neighbors, an owner may erect it, regardless of his motives. See *Roper v. Durham*, 353 S.E.2d 476 (Ga. 1987) (“[T]he evidence showed that, even if the defendant’s fence on his own land was erected with a malicious intent, it could have been erected for one or more useful purposes, and its erection resulted in no legally cognizable injury to, or invasion of right of, the plaintiff.”); *Rideout*, at 392 (“If the height above six feet is really necessary for any reason, there is no liability, whatever the motives of the owner in erecting it. If he thinks it necessary, and acts on his opinion, he is not liable because he also acts malevolently.”); Tussey, *supra*, §2a; but see *Hutcherson v. Alexander*, 264 Cal. App. 2d 126 (1968).

To be sure, Restatement (Second) of Torts § 829 makes it actionable for a landowner to use his land in a way that intentionally and significantly impairs a neighbor’s enjoyment of his land, if the owner’s “sole purpose” is to “caus[e] harm” to the neighbor. However, there are several reasons to doubt § 829’s literal force. First, the commentary to § 829 suggests that it should not be interpreted to make it unlawful for a landowner to engage in otherwise lawful conduct merely because he acts for

to *threaten* to erect such fences unless neighbors pay them not to.¹⁶⁴ And they are also permitted to *remove* existing fences that their neighbors value, regardless of their motives in removing them. Yet, if Sachs's thesis were adopted, it would mean, anomalously, that property owners would be prohibited from doing something that is less harmful than what they are allowed to do: they would be prohibited from threatening to remove such fences unless neighbors paid to retain them. Now this does not mean that Sachs is wrong about Toby, the pet bunny. Sachs may be right that Toby's owner ought to be prohibited from extracting money from pet-lovers by threatening to kill Toby. But if Sachs is right, it is because it ought to be a crime to do what Toby's owner threatens to do: it ought to constitute unjustified "animal cruelty" for an owner to kill a pet merely because he has sworn he will do so unless others pay him \$50,000.¹⁶⁵

In short, state appellate reports involving § 223.4(7) cases undermine Katz's and Berman's claims about how non-informational blackmail cases should be decided. They suggest that when prosecutors and courts come to apply §223.4(7), they reject Katz's and Berman's intuition that the motive with which a person acts transmutes an otherwise lawful completed act into a wrongful one, at least regarding acts other than the disclosure of incriminating or embarrassing information. They suggest that prosecutors and judges believe that the wrongfulness of threats regarding non-information acts is a function of the wrongfulness of the acts themselves.

VI. CONCLUSION

Blackmail raises two philosophical questions: (1) What is the *prima facie* moral wrong, if any, that an actor commits by offering to keep incriminating or embarrassing information secret in return for something of value, under the threat of otherwise disclosing it? (2) When, if ever, is an actor morally *justified* in committing what otherwise constitutes the aforementioned *prima facie* wrong?

I have focused on the first problem because, once it is resolved, the answer to the second problem falls into place. To be sure, as with other issues of justification

a spiteful motive: comment c to § 829 suggests that an owner's "sole purpose" is not to cause harm if his conduct confers a "beneficial use." Second, in the Restatement's list of "Case Citations" to § 829, no case in which a court prohibits a landowner from making reasonable use of his property merely because he acts from a bad motive is listed. Third, in so far as courts interpret § 829 to make a landowner's conduct actionable solely because of his motive, they have rejected § 829. *See* 44 Plaza, Inc. v. Gray-Pac Land Co., 845 S.W.2d 576 (Mo. Ct. App. 1992); *Cohen v. Perrino*, 50 A.2d 348 (Pa. 1947).

¹⁶⁴ Cf. Isenbergh, *supra* note 22, at 1920–23 (a landowner, A, should be allowed to bargain with a neighbor, B, for payment for foregoing what A has a right to do).

¹⁶⁵ The veterinarian association, the American Association of Feline Practitioners, enjoins its members not to perform "convenience euthanasia" of pets, that is, euthanasia simply because pet owners request it. *See* Bill Folger et al., *End of Life Issues in Feline Medicine*, AM. ASS'N OF FELINE PRACTITIONERS, END OF LIFE ISSUES IN FELINE MEDICINE IV (2009); available at <http://catvets.com/uploads/PDF/Nov2009EndofLife.pdf>.

in criminal law, people may differ about when blackmail is and is not justified. People may differ, for example, about (i) whether an employer, A, who suspects an employee, B, of a theft of property is justified in not disclosing the non-violent crime to the police unless the employee makes restitution; (ii) if so, whether A, whom B has threatened with death, is also justified in not disclosing the threats of violence to the police if B desists in making them; (iii) whether a woman, A, who knows that her husband, B, is committing adultery, is justified in threatening to publish the details unless B ceases doing so; (iv) if so, whether A is also justified in threatening to publish the details unless B ceases to engage in unrelated activity in which A is not a victim, e.g., tax evasion; (v) and, if so, whether A is also justified if she learned of the adultery through wrongful wiretapping.¹⁶⁶ Nevertheless, though people may disagree about how the balance is drawn, once the *prima facie* wrong of blackmail is identified, the process of weighing it against the countervailing wrongs from which A seeks to protect himself or others is relatively straightforward.

In contrast, the answer to the first question remains elusive. I have argued that, with respect to most categories of what is currently punished as blackmail, the *prima facie* wrong is no more paradoxical than extortion: threats and offers regarding information in those categories are criminalizable because the acts of disclosure and non-disclosure being respectively threatened and offered are morally wrongful when performed unconditionally, including the non-disclosure of incriminating information and the disclosure of information that is false, wrongly obtained, or justifiably private.

The remaining category, which I call "Category 5," is indeed paradoxical. It consists of cases in which the law currently makes it a crime for actors to threaten to disclose information that they are otherwise morally and legally permitted to disclose or withhold at their pleasure, including disclosures to the mass media of information about public officials and public figures and disclosures to individuals of information in which the latter have a legitimate interest. The comedian Bill Cosby's encounter with young Autumn Jackson is a good example. Ms. Jackson, who justifiably believed herself to be Cosby's disregarded daughter, offered to keep Cosby's secret in return for \$40 million while threatening to otherwise sell the story to the media. The public had a legitimate interest in knowing whether Cosby's public role as a responsible husband and loving father was hypocritical. Ms. Jackson was, therefore, entitled to sell the story to the media without incurring tort liability to Cosby, just as she was entitled to keep it secret if she preferred. Yet, because she made a biconditional proposal to Cosby rather than to the media, she was convicted of blackmail and sent to prison for more than two years in prison.¹⁶⁷

¹⁶⁶ For an insightful discussion of justifications for blackmail, see HARMLESS WRONGDOING, *supra* note 16, at 258–74.

¹⁶⁷ See *United States v. Jackson*, 180 F.3d 55, 58–59 (2d Cir. 1999), *rev'd en banc*, 196 F.3d 383 (2d Cir. 1999).

What makes cases like Cosby's so difficult is the tension between intuition and reason. On the one hand, popular intuition seems to support the punishment of actors like Ms. Jackson. On the other hand, reason suggests that a threat to do X (which, in Ms. Jackson's case, consisted of a threat to reveal her paternity) is not wrongful if X itself is not wrongful. Ms. Jackson threatened Cosby with a harm, but it was a morally and legally permissible harm. She made a proposal in the belief that silence was worth more to Cosby than disclosure was worth to the media. Cosby was free to accept or reject her offer. If Cosby feared that Ms. Jackson would make successive demands for money even after being paid, he was free to negotiate a lower price or reject the offer altogether. If he had accepted her offer, it would have been for the same reason that anyone agrees to a hard commercial bargain, namely, because he believed that it was to his advantage to do so. When he rejected her, it was for the same reason that anyone rejects a hard bargain, namely, because he believed that the price was too high for what he stood to gain. Ms. Jackson clearly miscalculated what Cosby would pay. But liberal societies do not convict and imprison people for overestimating the value of what they are lawfully selling or for exploiting market opportunities for windfall profits without expending much labor or talent.¹⁶⁸

Ultimately, if people's intuition about motives is truly in conflict with reason, lawmakers and judges must choose between them, as the U.S. Supreme Court appears to have chosen in *Garrison v. Louisiana*.¹⁶⁹ Mr. Garrison was found at trial to have acted with "ill will" in publicly criticizing Louisiana judges for malfeasance in office. As a consequence, he was convicted of criminal libel under Louisiana statute that followed common law—and the law in most of the states—in declaring that truth was a defense to libel, but which confined the defense to persons whose defamatory utterances were published "with good motives and for justifiable ends."¹⁷⁰ Garrison appealed, arguing that true statements about misconduct of public officials deserved First Amendment protection, regardless of a speaker's motives. Agreeing, the Supreme Court held that the public has a justifiable interest in true speech about public officials' conduct in office, and that as long as what a speaker says about it is true, his statements are justified by their content, "even if he [is] actuated by express malice."¹⁷¹

Nevertheless, before we resign ourselves to peoples' intuitions being in conflict with reason, we ought to explore whether their intuitions can be *explained*—that is, whether it is possible to account for intuitions in ways that are consistent with reason. One possible explanation is sociological. Blackmail has been a crime for well over a century, encompassing conduct like crime-exposure blackmail that is no more non-paradoxical than extortion. People have been socialized since Victorian times to think that, if it consists of anything, "blackmail"

¹⁶⁸ See generally HARMLESS WRONGDOING, *supra* note 16.

¹⁶⁹ *Garrison v. Louisiana*, 379 U.S. 64 (1964).

¹⁷⁰ *Id.* at 64, 70–71 (quoting LA. REV. STAT. ANN. § 14:47 (1950)).

¹⁷¹ *Id.* at 73 (quoting *State v. Burnham*, 9 N.H. 34, 42–43 (1837)).

consists of threats regarding adultery and sexual misconduct by people who are rich enough to pay, e.g., celebrities. That may explain why actors like Ms. Jackson are regarded as criminally culpable when they threaten to make disclosures that are lawful, while actors in less common, non-informational blackmail cases are allowed to threaten to commit acts that are lawful. If so, perhaps people who are now socialized to think conduct like Ms. Jackson's is a crime can be socialized to think that it is not.

A more intriguing possibility is that the intuitions that people possess regarding blackmail are intuitions that underlie DDE—the intuition that an actor who inflicts a harm that is known to be justified is nevertheless criminally responsible if his purpose is not to bring about the lesser evil under the circumstances but to inflict suffering. Thus, consider an actor, A, who learns that B is committing adultery and rightly believes that B's wife has a legitimate interest in knowing about it. A may be justified in informing B's wife. But ordinary observers may feel that if A makes disclosure and non-disclosure dependent upon whether he is paid, he provides evidence that, had he disclosed, his motive would be not to help B's wife but to spite A for refusing to pay, and that spiteful motives make disclosure and, hence, threats of disclosure blameworthy.¹⁷²

The question, then, is whether we can *explain* why people are drawn to DDE—explain, that is, why people believe that an actor's evil motives can determine his criminal responsibility when reason suggests otherwise. Perhaps it is because (1) the evil motives of such a person *are* constitutive of his moral qualities *as a human being*, (2) an actor's evil motives can transform his criminal responsibility in *other areas*, and (3) evil motives regarding harms seem similar to evil *beliefs* about lesser evils, and evil beliefs about lesser evils can, indeed, render otherwise blameless conduct blameworthy. Thus, an actor whose purpose is to inflict harm is, indeed, a bad person whose evil motivation renders him worthy of contempt; an actor's evil purpose can transform a lesser crime (e.g., involuntary manslaughter) into a greater crime (e.g., murder) and transform inchoate conduct into a criminal *attempt*;¹⁷³ and an actor who lacks a belief that he is committing a lesser evil lacks a defense of justification that he would otherwise possess.¹⁷⁴

However, these apparent analogies are inapposite. The fact that someone is a bad person who is worthy of contempt does not mean that he has committed a *bad act* that is deserving of punishment. That an actor's evil purpose can aggravate the

¹⁷² See *The Evidentiary Theory*, *supra* note 42, at 805, 838, 850; Katz, *supra* note 67, at 1598 (“[The disclosure of adultery in ‘Philanderer’] wouldn’t . . . be immoral if it had been made out of friendship with the cheated wife. It is immoral only because, if it were to be done, it would be done for purely retaliatory reasons—retaliation for [the target’s] refusal to pay.”).

¹⁷³ Cf. R.A. DUFF, *CRIMINAL ATTEMPTS* 127–32 (1996) (arguing that purpose can not only render an actor more blameworthy but also render conduct more wrongful); R.A. DUFF, *INTENTION, AGENCY AND CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW* 114, 176–79 (1990) (same).

¹⁷⁴ See MODEL PENAL CODE § 3 (1962), and especially § 3.09, where partial justifications are a function of what an actor “believes” and complete justifications are a function of reasonable belief.

blameworthiness of a completed wrong does not mean it can transform *blameless* completed conduct into a *blameworthy* completed conduct. That an actor's purpose to inflict an *unjustified* evil renders him guilty of attempt does not mean that purposeful harm inculcates an actor who reasonably believes the harm is *justified*.¹⁷⁵ And that an actor is culpable who inflicts a harm he *does not believe* is justified does not mean that an actor is culpable who purposefully inflicts a harm he *does believe* is justified.

Reason cannot wholly disabuse people of intuitions they strongly feel. However, if reason can explain why people possess such intuitions—if it can demonstrate that intuitions regarding DDE are rightly motivated yet misdirected—perhaps it can weaken them. And if reason weakens the intuition that threats regarding Category 5 disclosures are criminalizable, perhaps it can open the way toward decriminalizing such threats.

¹⁷⁵ See generally Peter Westen, *Is Intent Constitutive of Wrongdoing?*, in CRIME, PUNISHMENT, AND RESPONSIBILITY: THE JURISPRUDENCE OF ANTONY DUFF 192–214 (Rown Cruft et al. eds., 2011).